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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GLASS PACKAGING INSTITUTE, *et al.*,
Petitioners

v.

DONALD T. REGAN, *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether a court may properly deny standing to parties directly injured by unlawful agency action through the application of the zone of interests test where all remaining elements of the standing doctrine are met and there are no compelling reasons to withhold judicial review?

2. Whether the zone of interests standing test should be clarified or, in the alternative, overruled by this Court?

PARTIES TO THE PROCEEDING

The Petitioners in this case are the Glass Packaging Institute, a trade association representing, *inter alia*, manufacturers of glass bottles and the president of the association, William W. Sadd. Respondents are Donald T. Regan (in his capacity as Secretary of the Treaury), Stephen E. Higgins (in his capacity as Acting Director of the Bureau of Alcohol, Tobacco and Firearms), and, by their voluntary intervention, The Society of the Plastics Industry, Inc., a trade association representing, *inter alia*, manufacturers of beverage containers made of polyethylene terephthalate.

The Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on June 8, 1984.

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CITATION OF OPINIONS BELOW

The Opinion of the Court of Appeals for the District of Columbia Circuit is reported at —— F.2d —— (D.C. Cir. 1984) and is included in the Appendix for Petitioners submitted herein, commencing at page A-1. The Opinion and Order of the United States District Court for the District of Columbia have not been reported and appear in the appendix for Petitioners, commencing at page A-24.

JURISDICTION

The judgment of the Court of Appeals was entered on June 8, 1984 (Appendix for the Petitioners at page A-24). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553 (1976):

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts.

(b) General notice of proposed rulemaking shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rulemaking proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretive rules, general statements of policy, or rules of agency organization, procedure or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretive rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

Section 5301(a) of the Internal Revenue Code, 26 U.S.C. § 5301(a) (1976 & Supp. V 1981):

Whenever in his judgment such action is necessary to protect the revenue, the Secretary is authorized, by the regulations prescribed by him and permits issued thereunder if required by him—

(1) to regulate the kind, size, branding, marking, sale, resale, possession, use, and reuse of containers (of a capacity of not more than 5 wine gallons) designed or intended for use for the sale of distilled spirits (within the meaning of such term as it is

used in section 5002(a)(8)) for other than industrial use; and

(2) to require of persons manufacturing, dealing in, or using any such containers, the submission to such inspection, the keeping of such records, and the filing of such reports as may be deemed by him reasonably necessary in connection therewith.

Any requirements imposed under this section shall be in addition to any other requirements imposed by, or pursuant to, law and shall apply as well to persons not liable for tax under the internal revenue laws as to persons so liable.

STATEMENT OF THE CASE

This case arises out of Petitioners' effort to obtain judicial review of the failure of the Bureau of Alcohol, Tobacco and Firearms ("BATF") to comply with the procedural requirements of the Administrative Procedure Act while purporting to approve the substance polyethylene terephthalate ("PET") for use in the packaging of distilled spirits. This action was commenced on November 3, 1982 by Petitioners Glass Packaging Institute and William W. Sadd (collectively "GPI") to enjoin the BATF from granting approval of PET without first conducting a rulemaking proceeding in which Petitioners and other interested members of the public could participate and which Petitioners alleged was required by section 4 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553.[1] The jurisdiction of the District Court was invoked under 28 U.S.C. § 1331(a) and 28 U.S.C. § 1361.

In deciding to approve PET as a substance for use in the packaging of distilled spirits, the BATF acted under

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[1] Petitioners also challenged the BATF's alleged failure to comply with the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(c). The Court of Appeals disposed of this allegation on the merits in its June 8, 1984 decision, and Petitioners are not seeking review of this claim.

authority granted by section 5301(a) of the Internal Revenue Code, 26 U.S.C. § 5301(a) (1976 & Supp. V 1981). Under this statutory provision, the Secretary of the Treasury is directed to prescribe "by regulations" the kinds of containers which may be used for the packaging of distilled spirits.

Petitioners alleged in their complaint below that the BATF's ruling was substantive in nature and therefore subject to the informal "notice and comment" rulemaking requirements of 5 U.S.C. § 553. Petitioners further alleged, and the Court of Appeals found, that the BATF's action permits distillers to package their products in containers which they were legally prohibited from using prior to the agency's purported approval of PET. (Appendix at A-9). Finally, the Petitioners alleged that they would suffer significant competitive injury as a direct result of the BATF's approval of PET. The Court of Appeals recognized that this allegation had been proven as well. (Appendix at A-9).

On February 28, 1983 the District Court, while granting Respondents' motion for summary judgment, held that the BATF's ruling approving the use of PET was merely an interpretive rule, and therefore, by reason of the exception in 5 U.S.C. § 553(b)(3)(A), not subject to the notice and comment requirement of the APA. In its memorandum opinion, the District Court expressly rejected arguments raised by Respondents that GPI lacked standing to challenge the BATF's failure to comply with the APA. (Appendix at A-26). Petitioners filed a timely notice of appeal.[2]

On June 8, 1984, the United States Court of Appeals for the District of Columbia Circuit affirmed the judgment of the District Court. The court did not, however, consider the merits of Petitioners' claim that the BATF had acted in contravention of the APA. Instead, the

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[2] Set out in Appendix at A-34.

court held that neither GPI nor William W. Sadd had standing to contest the legality of the BATF's decision.[3]

In reaching its decision, the Court of Appeals expressly found that all constitutionally mandated standing requirements had been satisfied by Petitioners (Appendix at A-9). The court's opinion also recognized, albeit implicitly, that GPI had satisfied the prudential considerations related to standing which require a plaintiff to assert his own rights, and not those of a third party, and to assert an individualized, as opposed to a generalized, grievance. (Appendix at A-9, 10). Nevertheless, the Court of Appeals held that GPI lacked standing to challenge the Bureau's action based on its interpretation of the zone of interests test established by this Court in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). In applying the test the court found that the interest asserted by GPI—"the right to market distilled beverage containers free of competition from containers approved in an illegal fashion"[4]—is not an interest intended to be protected by Congress under 26 U.S.C. § 5301(a).[5]

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[3] The question of Petitioners' standing to challenge the BATF's action under the APA was first raised on appeal by the Court of Appeals, *sua sponte*, during oral argument on November 16, 1983. Petitioners' motion to file a Supplemental Brief Addressing the Question of Standing was granted by the court on December 12, 1983, and Petitioners' brief was accepted by the court on that date. *See* Appendix at A-35. Respondents Donald T. Regan and The Society of the Plastics Industry, Inc. also filed supplemental briefs with the Court of Appeals addressing the question of standing. *See* Appendix at A-35, 36.

[4] Appendix at A-10.

[5] The Court of Appeals concluded that the only interest intended to be protected or regulated by 26 U.S.C. § 5301(a) is the protection of the revenue. (Appendix at A-11). The decision thus effectively denies standing to contest BATF actions under § 5301(a) to anyone except the Secretary himself, the only person with a sufficiently individualized interest in the protection of the revenue

REASONS FOR GRANTING THE WRIT

A. Introduction

This case involves a federal question of substantial importance which the Court of Appeals has decided in a manner inconsistent with the decisions of this Court: whether, in the absence of any compelling reason to withhold judicial review, the zone of interests test may be relied upon by a court as the sole basis for denying standing to challenge unlawful agency action? If the decision in the Court of Appeals below is permitted to stand, GPI respectfully submits that a broad range of agency actions will be insulated from judicial review, even when they are taken in contravention of the Congressionally mandated requirements of the APA.

In finding that Petitioners lacked standing to challenge the BATF's failure to comply with the APA the Court of Appeals misapplied the decision of this Court in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). Consequently, the court's decision is in conflict with *Data Processing* and a number of related decisions of this Court.

Accordingly, this Court should review the decision of the District of Columbia Circuit in this case and, upon review, reverse that decision.

B. The Decision of the Court of Appeals Conflicts With The Applicable Decisions Of This Court and Effectively Immunizes Unlawful Agency Action From Judicial Review

In *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464 (1982), this Court stated that, as "an irreducible constitutional minimum," a party seeking to invoke the au-

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to support a claim of standing. *See, e.g., Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 80 (1978).

thority of a federal court must: 1) "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant;" 2) show that the injury "fairly can be traced to the challenged action;" and 3) show that the injury "is likely to be redressed by a favorable decision." *Id.* at 472. Beyond these constitutional prerequisites to bringing suit in the federal courts, the *Valley Forge* Court observed that "a set of prudential principles that bear on the question of standing . . ." have been developed in prior decisions of this Court. 454 U.S. at 474.[6] Unlike the constitutionally based elements of standing, which must be demonstrated prior to invoking the authority of a federal court, these remaining elements of the standing doctrine were characterized by this Court as "merely . . . factor[s] to be balanced in the weighing of so-called 'prudential' considerations." 454 U.S. at 475. This Court has also stated that the prudential considerations which bear upon standing are not to be "appl[ied] . . . to all cases as a matter of course," *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 80 (1978), but are instead to be "applied in appropriate circumstances." *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 100 n.6 (1979) (referring specifically to zone of interests test).

In *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970), and its

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[6] The prudential principles bearing on standing are the following: 1) "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim on the legal rights or interests of third parties . . . ;" 2) the Court will "refrain[] from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches;" and 3) the Court has on occasion inquired as to whether "the plaintiff's complaint fall[s] within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Valley Forge*, 454 U.S. at 474-75 & n.12.

progeny,[7] this Court identified as one of the prudential considerations which might bear upon the question of standing the inquiry "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." The Court's articulation of the zone of interests test was prompted by the "trend . . . toward enlargement of the class of people who may protest administrative action." 397 U.S. at 154. In furtherance of this trend, the zone of interests test was adopted to replace the more restrictive "legal interest" test which had prevailed in the federal courts, and which had been applied by the lower court in *Data Processing*.[8]

Thus, Petitioners submit that the Court of Appeals decision in this case miscomprehends and conflicts with the *Data Processing* line of cases in two critical respects: first, the Court of Appeals utilized the zone of interests test, adopted by this Court to relax prudential restraints on standing to protest administrative action, in a manner which significantly curtails access to the courts for persons aggrieved by the unlawful action of a federal agency; and second, by requiring Petitioners to demonstrate that the interest they asserted was intended to be regulated or protected by § 5301(a), the court below in effect revived the "legal interest" test which this Court specifically rejected as a test for standing.

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[7] *Investment Company Institute v. Camp*, 401 U.S. 617 (1971); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970).

[8] The Court of Appeals in *Data Processing* had required the plaintiff to demonstrate that it was asserting a "legal interest," that is, one founded in a contract or statute. 406 F.2d 837, 842-43 (4th Cir. 1969). In rejecting the legal interest test as a prudential element of the standing doctrine, this Court expressly stated that "the existence or non-existence of a 'legal interest' is a matter quite distinct from the problem of standing." 397 U.S. at 153 n.1. *See also Barlow v. Collins*, 397 U.S. 159, 163-65 (1970).

It is also apparent that if the opinion of the Court of Appeals in this case were to be applied to the facts which were before this Court in *Data Processing*, the Court of Appeals' reasoning would produce a result contrary to that reached by this Court. In *Data Processing* a trade association representing sellers of data processing services brought suit to challenge a ruling by the Comptroller of the Currency which permitted banks to make such services available to other banks and bank customers. The injury asserted by the plaintiffs was the loss of profits due to increased competition from the entry of banks into the data processing services market. 397 U.S. at 152. This Court, applying the zone of interests test, held that plaintiffs had standing.

The interest sought to be vindicated in *Data Processing* —the relative competitive position of data processing service companies—would not, under the restrictive reasoning of the decision below, have provided a sufficient basis upon which to confer standing. Rather, in conflict with this Court's holding, the Court of Appeals reasoning would have required it to conclude that the competitive interests of the data processing service companies were not intended to be protected or regulated by § 4 of the Bank Service Corporation Act,[9] and that judicial review was foreclosed.

The similarity between the *Data Processing* case and the instant case is compelling. Furthermore, the *Data Processing* decision is solidly buttressed by this Court's subsequent decisions in *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971) (open-end investment companies have standing under § 4 of Bank Service Corporation

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[9] The legislative history of § 4 of the Bank Service Corporation Act of 1962, the statute identified by the Court as relevant for zone of interests purposes in *Data Processing*, states that the provision was intended to promote *competition among banks* of different sizes. *See* Sen. Rep. No. 2105, 87th Cong., 2d Sess. 2-4 *reprinted in* 1962 U.S. Code Cong. & Admin. News 3878, 3879-81.

Act to challenge ruling permitting banks to establish and operate collective investment funds) and *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970) (travel agents have standing under § 4 of Bank Service Corporation Act to challenge ruling permitting banks to provide travel services). Thus, it is evident that the decision of the Court of Appeals in this case simply cannot be squared with this Court's decisions stating and applying the zone of interests test.

No decision of this Court has ever applied the zone of interests test to deny standing to a litigant. Moreover, in a number of cases decided since *Data Processing*, this Court has rejected objections that certain plaintiffs lacked standing while declining to apply the zone test, even though application of the test arguably would have yielded a different result. *See, e.g., Bryant v. Yellen*, 447 U.S. 352, 366-68 (1980) (prospective purchasers who could reap windfall profits on resale of land, the market value and availability of which would be affected by applicability of a limitation on the amount of such land eligible for irrigation under federal reclamation law, found to have standing to contest agency decision that limitation was inapplicable); *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 74 (1978) (plaintiffs, who alleged various injuries they would suffer if nuclear plant were constructed, found to have standing to challenge constitutionality of statute limiting liability of plant operators for nuclear disasters); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (standing of promoter of product to assert constitutional rights of users of product upheld, even though promoter's interest not within zone). Read in conjunction with *Data Processing* and its progeny, these decisions indicate that, in the absence of compelling circumstances which might require a court to withhold judicial review,[10] it is not proper for a court to

[10] The basis upon which this Court has developed the prudential considerations which bear upon standing is its concern that the

apply the zone of interests test to deny standing to parties injured by federal agency action who are able to satisfy the constitutional prerequisites of standing. *See also Duke Power Co.*, 438 U.S. at 80 ("Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the stand-

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federal courts might unduly interfere with the activities of the other co-equal branches of the Government. *See, e.g., Warth v. Selden*, 422 U.S. 490, 498-500 (1975). *See also Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130, 140 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) ("the zone test serves the purpose of allowing courts to define those instances when it believes the exercise of its power . . . is not congruent with the mandate of the legislative branch in a particular subject area."). The application of the zone test by the court below, however, did not prevent the court from interfering with a mandate of the legislative branch. Rather, assuming Petitioners' allegation that BATF failed to comply with the APA to be correct, *see Warth v. Seldin*, 422 U.S. at 501, the Court of Appeals' decision frustrated the will of Congress as expressed in the APA while upholding no discernible Congressional interest under 26 U.S.C. § 5301(a). In such an instance, proper concern for the prerogative of the legislative branch would appear to require a court to review, rather than abstain from reviewing, an agency's alleged unlawful action.

The need for prudence in the exercise of judicial power should not obscure the important public policy concerns intended to be addressed by the APA. The APA is premised upon Congress' recognition that comments from interested persons would serve as a valuable check on arbitrary or ill-conceived agency action and that even persons with a narrow self-serving interest—and perhaps especially those persons—would provide a valuable source of criticism of agency action. Thus, it is not the source of the comments, but rather their merits, that were foremost in Congress' mind. While the prudential zone of interests test may be useful in avoiding conflicts between the judicial and other branches of government in those instances where Congress has given some indication that it desired to foreclose judicial review, where there is no evidence of such Congressional intent the zone test should not be utilized to insulate agency decisionmaking from the public input contemplated by the APA.

ing doctrine are generally satisfied when the constitutional requisites are met.").

The effect of the Court of Appeals decision denying Petitioners standing is to insulate the BATF's action from judicial review. Since the Court of Appeals' decision denies standing to the parties most directly affected by the Bureau's action, *i.e.*, the Petitioners, the decision necessarily denies standing to all other persons, such as consumers and producers of distilled spirits, who may also be affected by that action. In essence, the Court of Appeals held that the BATF's alleged failure to comply with the APA is not subject to judicial review, and did so without finding any evidence that Congress intended to preclude such review.

This result is in direct conflict with the governing rule as stated by this Court: "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). *See also Rush v. Cort*, 369 U.S. 367, 380 (1962) (only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review). No evidence of Congressional intent to withhold judicial review is found in 26 U.S.C. § 5301(a), the statutory provision which authorizes the BATF to approve containers for distilled spirits. Thus, judicial review of the BATF's action should not be withheld. The decision of the court below, however, has turned the Congressional intent inquiry mandated by *Abbott Laboratories* on its head by requiring a plaintiff to demonstrate evidence of Congressional intent to *provide for* judicial review. Such a requirement cannot be squared with this Court's decision in *Abbott Laboratories*, where it stated: "The Administrative Procedure Act provides specifically not only for review of '[a]gency action made reviewable by statute', but also for review of 'final agency action for which

there is no other adequate remedy in a court', ..." 397 U.S. at 140.[11]

The decision of the Court of Appeals in the instant case is in direct conflict with the decisions of this Court which have stated and applied the zone of interests test, as well as the decisions of this Court which have addressed the availability of judicial review under the APA. Moreover, if allowed to stand, the decision will effectively foreclose judicial review of a wide range of federal agency decisions.[12] This result could not have

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[11] The Court of Appeals' opinion also failed to identify any compelling reasons for its denial of standing to Petitioners. Rather, the court required Petitioners to advance compelling reasons for the court to grant standing. (Appendix at A-15.) Such a requirement is inconsistent with this Court's decisions in *Abbott Laboratories* and *Rush v. Cort.*

[12] For example, the BATF is also authorized pursuant to 26 U.S.C. § 5301(a) to regulate the *size* of liquor bottles. In the past, the BATF has conducted notice and comment rulemaking when establishing permissible liquor bottle sizes. *See, e.g., Goldstein v. Miller*, 488 F. Supp. 156, 158-60 (D.M.d. 1980), *aff'd mem.*, 649 F.2d 863, 864 (4th Cir.), *cert. denied*, 454 U.S. 828 (1981). Respondents have recognized that "[t]he choice of permissible sizes for liquor bottles potentially affects a broad range of public interests and diverse groups and is a matter on which ATF needs public comment so that it can make an informed decision." Brief for Intervenor-Defendant Appellee The Society Of The Plastics Industry, Inc. (filed with the Court of Appeals in the proceedings below) at 21. The Court of Appeals decision in this case, however, applies with equal force to such BATF rulings and, consequently, neither the Society of the Plastics Industry nor any other party, except the Secretary of the Treasury, will have standing to challenge future BATF rulings establishing mandatory liquor bottle sizes, whether or not a notice and comment rulemaking proceeding is conducted.

Nor is the Court of Appeals decision limited to the actions of the BATF. Because of the large number of cases brought in the District of Columbia Circuit challenging actions by Federal agencies, the manner in which the Court of Appeals applies the zone test will have a broad impact on the ability of persons injured by

been intended by Congress nor by this Court and therefore, the Court should grant the Petition for a Writ of Certiorari upon this question.

C. The Zone of Interest Test Has Been Applied By The Lower Federal Courts In a Confusing And Inconsistent Manner and Should Be Clarified Or Overruled By This Court

In the wake of this Court's decision in *Data Processing* there has been a large number of lower court decisions which have reached inconsistent, conflicting, and often illogical conclusions about the requirements for standing and the appropriate application of the zone of interests test. In *Upper Pecos Association v. Stans*, 452 F.2d 1233, 1235 (10th Cir. 1971), *vacated on other grounds*, 409 U.S. 1021 (1972), for example, the Tenth Circuit, answering a challenge to plaintiffs' standing to contest a violation of the National Environmental Policy Act, concluded that "[t]he [plaintiffs'] interests are within the zone protected by the APA." The court's focus upon the APA, rather than the statute under which the agency acted, *i.e.*, NEPA, is inconsistent with the manner in which this Court has applied the zone test. *See Data Processing*, 397 U.S. at 153-56. Nevertheless, it is beyond peradventure that GPI's interest in receiving notice and an opportunity to comment would fall within the zone of interests protected or regulated by the APA. Thus, GPI would have standing under the Tenth Circuit's application of the zone test in *Upper Pecos*.

In *Florida v. Weinberger*, 492 F.2d 488, 494 (5th Cir. 1974), the Fifth Circuit found that the state of Florida

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the action of any federal agency to obtain judicial review of such action. For example, the court has already applied the zone test to insulate alleged illegal actions of the Defense Department, *see Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838 (D.C. Cir. 1982), and the Internal Revenue Service, *see Tax Analysts and Advocates v. Blumenthal*, 566 F.2d 130 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978), from judicial review.

had standing to challenge a federal agency regulation by simply declining to apply the zone of interests test. The zone test was similarly ignored by the Fourth Circuit in *William F. Wilke, Inc. v. Department of Army of United States*, 485 F.2d 180 (4th Cir. 1973). The approach to standing taken in these decisions, *i.e.*, declining to apply the zone test where the constitutionally mandated requirements of standing are satisfied and no compelling reasons to deny standing are present, is consistent with the manner in which this Court has decided a number of post *Data Processing* cases. *See* pp. 11-13, *supra*. The court below found that Petitioners in this case satisfied all elements of standing, both constitutional and prudential, except the zone of interests test. Thus, Petitioners would have standing under the analysis employed by both the *Weinberger* and *William F. Wilke* courts.

Finally, in *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208, 1212 n.4 (8th Cir. 1972), the Eighth Circuit expressly stated its disagreement with the zone test: "We think that all that is required for a plaintiff to have standing to sue for a constitutional or statutory violation is a showing of 'injury in fact.'"

In view of these decisions, the present state of the law on the application of the zone of interests test is perhaps best characterized by the following statement of the Court of Appeals for the District of Columbia Circuit in *Control Data Corp. v. Baldridge*, 655 F.2d 283, 293 (D.C. Cir.), *cert. denied*, 454 U.S. 881 (1981): "A survey of this law reveals, however, more variety than uniformity among the approaches to the zone test."

The confusing and often inconsistent manner in which the zone of interests test is being applied by the lower federal courts has led to the disturbing development that access to the federal courts for persons aggrieved by agency action is not being granted in an even handed manner throughout this country. Accordingly, the Petition for a Writ of Certiorari should be granted so that

this Court may consider clarifying the zone of interests test for standing in order to insure that judicial review of allegedly unlawful agency action is granted on a consistent basis throughout the federal court system.

In the alternative, Petitioners respectfully request this Court to consider specifically repudiating the zone of interests test as a measure of standing. Such action would be wholly consistent with the principles which govern this Court's deliberations. In *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), this Court overruled its earlier decision in *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967), while offering the following explanation for its action:

> Although *Schwinn* is supported by the principle of *stare decises*, . . . we are convinced that the need for clarification of the law in this area justifies reconsideration. . . . Since its announcement, *Schwinn* has been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts. . . . In our view, the experience of the last 10 years should be brought to bear on this subject of considerable commercial importance.

433 U.S. at 47-49 (footnotes omitted). Similar confusion and controversy in both the courts[13] and the scholarly journals[14] has attended the application of the zone of in-

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[13] *See, e.g., American Friends Service Committee v. Webster*, 720 F.2d 29, 49-52 (D.C. Cir. 1983); *Copper & Brass Fabricators Council, Inc. v. Dept. of the Treasury*, 679 F.2d 951, 953-55 (D.C. Cir. 1982) (Ginsburg, J., concurring in the result) (requesting clarification of zone test from the Supreme Court). *See also Barlow v. Collins*, 397 U.S. 159, 167-70 (1970) (Brennan, J. joined by White, J., concurring in the result and dissenting) (the zone test "encourages badly reasoned decisions which may well deny justice in this complex field.")

[14] *See, e.g.*, Davis, Standing, 1976, 72 *Nw. U.L. Rev.* 69 (1977); 4 K. Davis, Administrative Law Treatise § 24.17 (2d ed. 1983); Albert, Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief, 83 *Yale L.J.* 425, 493-97 (1974); Garvey, A Litigation Primer for Standing Dismissals, 55

terests test since it was announced in *Data Processing*. Thus, the need for clarification of the standing doctrine justifies this Court's reconsideration of the zone of interests test as a measure of standing and the impact of the test upon the rights of persons injured by federal agency actions.

CONCLUSION

The decision of the Court of Appeals for the District of Columbia Circuit, applying the zone of interests test as the sole basis for denying Petitioners' standing to challenge unlawful agency action, is inconsistent with a number of decisions of this Court. Moreover, the decision effectively immunizes unlawful agency action from judicial review. The manner in which the Court of Appeals decided this case accurately reflects the level of disarray and confusion concerning the application of the zone of interests test in the lower federal courts. Accordingly, the Petition for a Writ of Certiorari should be granted by this Court to clarify the requirements for standing to challenge alleged unlawful agency action or in the alternative, to reconsider the zone of interests test as a measure of standing.

Respectfully submitted,

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N.Y.U. L. Rev. 545, 567-69 (1980); Sedler, Standing, Justiciability, and All That: A Behavioral Analysis, 25 *Vand. L. Rev.* 479, 486-91 (1972).

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1390

GLASS PACKAGING INSTITUTE, *et al.*,
Appellants

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 82-03142)

Argued 16 November 1983

Decided 8 June 1984

Michael S. Kelly, with whom *Miles W. Kirkpatrick*, *Caswell O. Hobbs, III*, *Janine Sweeney Frias* and *Scott Stempel*, were on the brief for appellants. *Howard T. Weir* also entered an appearance for appellants.

Joseph W. Lobue, Assistant United States Attorney, with whom *Stanley S. Harris*, United States Attorney, *Royce C. Lamberth*, *R. Craig Lawrence*, and *Michael J. Ryan*, Assistant United States Attorneys, and *Robert M. Tobiassen*, Attorney, Bureau of Alcohol, Tobacco and Firearms, were on the brieffi for appellees Regan, Secretary of Treasury, et al. *Lee S. Strickland*, Assistant

United States Attorney, also entered an appearance for appellees, Regan, Secretary of Treasury, et al.

Jerome H. Heckman, with whom *John B. Dubeck*, *Peter L. de la Cruz* and *Ilene R. Heller*, were on the brief for appellee Society of Plastics Industry, Inc.

Before: WILKEY and GINSBURG, *Circuit Judges*, and MACKINNON, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge*: The Glass Packaging Institute, a trade association of glass bottle manufacturers, and its president, William W. Sadd, brought this suit to block a decision by the Bureau of Alcohol, Tobacco and Firearms permitting liquor to be packaged and sold in plastic polyethylene terephthalate bottles. The plaintiffs argue that this administrative ruling is unlawful because it was promulgated without notice and comment. They also assert that the risk of criminal tampering with polyethylene terephthalate bottles should have been considered in the environmental assessment prepared by the agency. The district court rejected both these claims. We affirm the district court's decision, concluding that plaintiffs lack standing to challenge alleged procedural deficiencies in the administrative process, and that the agency's environmental assessment was not defective.

I. BACKGROUND

A. *Statutory Scheme*

The types of materials that may be used to package alcoholic beverages are regulated by two federal agencies, the Food and Drug Administration ("FDA") and the Bureau of Alcohol, Tobacco and Firearms ("Bureau"). Although these agencies serve diverse statutory goals, their respective regulatory domains partially overlap. Consequently, bottlers of alcoholic beverages must comply

with the dual sets of regulations promulgated by these agencies.

The FDA is charged with the primary responsibility of safeguarding the lives and health of consumers of foods and drugs. The Federal Food, Drug, and Cosmetic Act prohibits the use of a "food additive" unless that use conforms to FDA regulations.[1] Alcoholic beverages are foods,[2] and liquor bottles are considered additives[3] under the definitional sections of this Act. Consequently, distillers wishing to bottle alcoholic beverages using a packaging material not currently on the market must seek FDA approval before using the new substance.

This process is usually commenced by filing a food additive petition with the FDA, which then publishes a notice in the Federal Register. After evaluating the potential impact on the public health and safety of the use of the proposed substance, as well as considering the accompanying environmental effects, the petition is either granted or denied. Approval of the petition is usually effectuated by an amendment to the FDA's food additive regulations permitting anyone to use the newly approved packaging material subject to any limitations or guidelines contained in the amended regulations.[4]

The second series of regulations governing the packaging of alcoholic beverages exists to regulate tax revenues. The United States levies a tax on each gallon of distilled spirits produced in or imported into the United

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[1] 21 U.S.C. § 348 (1982).

[2] "The term 'food' means (1) articles used for food or drink for man or other animals . . . ." *Id.* § 321(f) .

[3] "The term 'food additive' means any substance . . . intended for use in . . . packaging, transporting, or holding food . . . ." *Id.* § 321(s).

[4] *See generally* Brief for Federal Appellees at 1-2; Brief for Intervenor-Defendant Appellee the Society of the Plastics Industry, Inc. at 4-5, 17-18.

States, based on the volume of alcohol contained in the beverage.[5] The Secretary of the Treasury is charged with the responsibility of collecting these revenues. Because the intergrity of the packaging materials can have a direct effect on the volume of alcohol and, consequently, the amount of tax to be collected, the use and refilling of liquor bottles are strictly regulated.[6] Under authority delegated by the Secretary of the Treasury,[7] "whenever in [its] judgment such action is necessary to protect the revenue," the Bureau is authorized (1) "to regulate the kind, size, branding, marking, sale, resale, possession, use, and reuse of containers . . . designed or intended for use for the sale of distilled spirits," and (2) to require persons manufacturing these containers to submit to inspections, to keep records, and to file reports as prescribed by the Bureau regulations.[8] Regulations promulgated by the Bureau pursuant to this authorization require that containers used for liquor bottles be made from materials which it has approved as adequately protecting tax revenues.

B. *Current Controversy*

In 1973, after notice and comment rulemaking proceedings, the FDA approved the use of polyethylene terephthalate plastic in containers used for alcoholic beverages not exceeding fifty percent alcohol by volume. These beverages include beer, wine, and many liquors falling within the Bureau definition of distilled spirits.[9] Anticipating that several distillers might eventually request clearance to use this type of plastic in packaging distilled spirits, in 1976 the Bureau issued an industry circular

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[5] *See* 26 U.S.C. § 5001(a)(1) (1982).

[6] *Id.* § 5301(c).

[7] 37 Fed. Reg. 11,696 (10 June 1972).

[8] *See* 26 U.S.C. § 5301(a) (1982).

[9] *See id.* § 5002(a)(8).

notifying proprietors of distilled spirits plants of the procedures to be followed to obtain authorization to use new plastic compounds in liquor bottles. These steps included submitting sample bottles for use in Bureau testing, and providing verification that the plastic packaging compound meets all applicable FDA requirements for packaging alcoholic beverages.[10] The Bureau also noted in this circular that the National Environmental Policy Act would require the Bureau to prepare a study of possible environmental effects caused by use of the proposed plastic packaging material.

Apparently no formal distillers' applications to use polyethylene terephthalate plastics were filed until 27 October 1980 and 26 October 1981. On these dates two distillers requested Bureau clearance to use polyethylene terephthalate ("PET") in packaging their distilled spirits. On 8 June 1981, the Glass Packaging Institute ("GPI") requested that the Bureau conduct an informal rulemaking on the issue of whether the Bureau's regulations should be amended to embrace PET liquor bottles.

No rulemaking proceeding was initiated in response to GPI's request. However, on 11 January 1982 the Bureau notified the public of its intent to prepare an environmental assessment on the use of PET in liquor bottles. GPI filed comments, urging that the manufacturing of PET containers would consume too much energy, that the use of PET in packaging could be carcinogenic, that incineration of discarded PET bottles would release harmful gases, and that disposal of solid wastes would present additional environmental hazards. These and other environmental objections were taken under advisement by the FDA. Well after the close of the period for filing written comments, and only approximately two weeks before the initial environmental evaluation was due to be released,

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[10] Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, *Industry Circular*, No. 76-19, 25 August 1976, §§ 3.1, 3.2, 4.02, *reprinted at* Joint Appendix ("J.A.") 45-46.

GPI also sought to notify the Bureau about the environmental threat posed by the alleged tamperability of PET bottles. This concern was prompted by nationally publicized news stories about unrelated incidents of tampering with nonprescription pain medicines. GPI's attempts to schedule a meeting with the Bureau on the issue of PET tamperability were unsuccessful.

On 5 October 1982, without specifically mentioning the two pending requests for PET clearance, the Bureau issued a final rule effective 5 November 1982 amending its definition of a permissible liquor bottle. The previous definition permitted distillers to use liquor bottles made of "glass, or earthenware, or other suitable material approved by the Director [of the Bureau]."[11] The new regulation authorized liquor bottles "made of glass or earthenware, or of other suitable material approved *by the Food and Drug Administration* . . . and which has been determined by the Director [of the Bureau] to adequately protect the revenue."[12] The rule codified the Bureau's longstanding practice of deferring to FDA expertise on the health and safety issues associated with approval of new packaging materials.[13]

Because the FDA had previously approved PET for use in liquor bottles, the final rule arguably permitted distillers to begin manufacturing PET liquor bottles subject to FDA regulations. However, at this point, the Bureau had not ruled on whether PET would adequately protect tax revenues. Neither had a final environmental assessment been issued.

One day before the final rule was to become effective GPI filed suit in the United States District Court seeking

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[11] *See* 26 C.F.R. § 175.17 (Revised, 1955); J.A. 104; Brief for Federal Appellees at 2.

[12] *See* 47 Fed. Reg. 43,947 (1982), codified at 27 C.F.R. § 19.11 (1983) (emphasis added).

[13] 47 Fed. Reg. 43,946 (1982); J.A. 66.

to enjoin the Bureau from approving PET liquor bottles. GPI initially sought to overturn the approval of PET on three grounds. First, it contended that the Bureau's failure to conduct an informal rulemaking proceeding before approving PET liquor bottles violated the Administrative Procedure Act. Second, it charged that the Bureau's failure to prepare an environmental impact statement was inconsistent with the National Environmental Policy Act. Finally, GPI asserted that the Bureau had violated its own regulations by failing to determine whether PET would adequately protect revenue. The plaintiffs' motion for a temporary restraining order based on these grounds was denied on 4 November 1982.

On 4 November 1982 the Bureau released a final environmental assessment which concluded that use of PET liquor bottles would not have a significant environmental effect. That assessment did not discuss the susceptibility of PET bottles to criminal tampering. Later in November 1982, the Bureau also issued a ruling that use of PET liquor bottles would not adversely affect revenue collection, and could lawfully be used to package distilled spirits.[14]

On 28 February 1983, in response to the defendants' motion for summary judgment, United States District Judge Norma Holloway Johnson dismissed the plaintiffs' suit. The district court ruled that subsequent to the filing of the suit the agency properly concluded that PET would protect revenues, a point which GPI conceded.[15] The court also held that the Bureau had acted lawfully under the National Environmental Policy Act when it determined that an environmental impact statement was unnecessary. Finally, the court rejected the claim that an

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[14] *See* Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, *Industry Circular*, No. 82-14, 22 Nov. 1982, *reprinted at* J.A. 209.

[15] J.A. 254-55.

informal rulemaking was required by the Administrative Procedure Act, holding that the approval of PET was merely an interpretive rule, exempt from notice and comment rulemaking.[16] GPI then brought this appeal, contending that the court erred in its treatment of the environmental and procedural issues.

II. Discussion

A. *Procedural Claim*

Plaintiffs argue that the Bureau's amendment of its regulations to permit the packaging of distilled spirits in PET containers constitutes a substantive rule. They allege that the agency's failure to conduct notice and comment procedures before promulgating that rule allegedly violates Section 4 of the Administrative Procedure Act.[17] However, before we reach the merits of these contentions we must consider the plaintiffs' standing to raise this issue.

The exercise of judicial power under Article III is subject to several preconditions which, under the rubric of standing, help assure that the Judicial Branch fills its proper role under the tripartite system of powers envisioned under the Constitution. Among these preconditions, the Supreme Court has articulated several irreducible constitutional requirements which a plaintiff must meet before he is entitled to obtain relief in federal courts. All plaintiffs must demonstrate an actual or threatened injury caused by the allegedly illegal conduct of the defendant which can be fairly traced to the challenged action, and which is likely to be redressed by a favorable decision.[18] In addition to these constitutional

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[16] J.A. 258.

[17] 5 U.S.C. § 553 (1982).

[18] *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

requirements, several prudential principles also caution against exercise of judicial power.[19] Thus, the Supreme Court has generally required that a plaintiff's alleged injury at least arguably fall "within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[20] Unless these constitutional and prudential standing requirements are satisfied by GPI or William W. Sadd we may not reach the merits of their claims.

The injury allegedly caused by the challenged approval of PET liquor bottles is the potential loss of revenues from the production and sale of glass liquor bottles which would occur if PET liquor bottles are allowed to compete in the liquor bottle market.[21] This is clearly a concrete, individualized injury which is directly attributable to the Bureau's approval of PET liquor bottles. Because distillers are unable to use PET packaging in the absence of Bureau approval, invalidation of the challenged regulations would avert the threatened injury. Thus, the district court correctly held that the constitutionally-grounded standing requirements are satisfied by plaintiffs' allegations.

However, neither the district court nor the parties below gave much consideration to whether the injury alleged as the basis for plaintiffs' procedural claim satisfies the zone of interests requirement. This omission is critical, since the zone of interests test implicates many

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[19] *Id.* at 475; *American Friends Service Comm. v. Webster*, 720 F.2d 29, 51 (D.C. Cir. 1983).

[20] *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982) (quoting *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 153 (1970)).

[21] Amended Complaint for Declaratory and Injunctive Relief ¶ 33, J.A. 156.

of the same policies which underlie the constitutional standing requirements.[22]

The zone of interests test is the element of standing which focuses on the relationship between the statute on which the claim is based and the alleged injury.[23] As we explained in *Copper & Brass Fabricators Council, Inc. v. Department of the Treasury,* this test "requires some indicia—however slight—that the litigant before the court was intended to be protected, benefitted or regulated by the statute under which suit is brought."[24] Here, the statute GPI invokes is 26 U.S.C. § 5301(a). The interest advanced by the plaintiffs is "the right to market distilled beverage containers free of competition from containers approved in an illegal fashion."[25] Unless there is some indication that this competitive interest is one protected or regulated under Section 5301(a), plaintiffs' claim cannot qualify under the zone of interests test.

Section 5301(a) states: "*Whenever in* [*its*] *judgment such action is necessary to protect the revenue,* the [Bureau] is authorized . . . (1) to regulate the kind . . . of containers . . . intended for use for the sale of distilled spirits . . . and (2) to require, of persons manu-

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[22] *Compare Tax Analysts & Advocates v. Blumenthal,* 566 F.2d 130, 140 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 1086 (1978) (zone of interests test intended to assure congruence between exercise of judicial power and mandate of legislative branch) *with Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 473-75 (1982) (prudential standing principles framed with a view to Article III policies, such as the balanced relationship between coequal arms of Federal Government).

[23] *See Association of Data Processing Service Orgs. v. Camp,* 397 U.S. 150, 153 (1970).

[24] 679 F.2d 951, 952 (D.C. Cir. 1982).

[25] Appellants' Supplemental Brief Addressing the Question of Standing at 11.

facturing . . . such containers, the submission to . . . inspection . . . ." [26] By its terms, this section does not directly authorize the Bureau to regulate competition among manufacturers of liquor bottles. Its sole objective is that of safeguarding the revenues derived from gallonage liquor taxes. The plaintiffs do not suggest that other interests are protected. Indeed, they admit that "Section 5301(a), in its entirety, *is a single statutory provision with a single purpose.* . . . [T]he entire provision was drafted to enable the Secretary to 'protect the revenue.' " [27] The regulation of competition among liquor bottle manufacturers is simply not one of the direct statutory interests protected by the statute on which plaintiffs rely.

It is also clear that competition among container manufacturers, as such, is not an indirect statutory objective, since there is no relationship between *who* makes the bottles and the *amount* of revenues recovered. Plaintiffs have not argued that an adverse impact on one category of bottle manufacturers could negatively affect the total revenues raised. The Bureau's statutory obligation is to ensure that the physical integrity of the container adequately protects the taxable commodity, alcohol, from undue variation; it has no obligation to guarantee or regulate the financial or competitive status of the industries and companies which undertake to manufacture liquor bottles. The plaintiffs' asserted interest in protecting their competitive position from vitiation caused by the allegedly illegally authorized entry of other potential competitors falls well outside the zone of interests protected or regulated by Section 5301(a).

Plaintiffs have not identified an injury to any other interest which could come within the zone protected by

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[26] 27 U.S.C. § 5301(a) (1982).

[27] Appellants' Supplemental Brief Addressing the Question of Standing at 6-7 n.6.

this section.[28] In their brief on this issue they focus on the fact that as manufacturers of containers for distilled beverages, their products are regulated by the Bureau. However, our prior decisions make it clear that mere regulatory impact on a party's commercial interests causing a diminished competitive status does not satisfy the zone of interests test when that competitive status is not an interest arguably regulated by the statute forming the basis for the action.

We recently faced a similar situation in *Copper & Brass Fabricators Council, Inc. v. Department of the Treasury*,[29] which dealt with a challenge by a trade association of copper manufacturers to the Treasury Department's decision to decrease drastically the copper content of the penny, replacing it with zinc. The enabling statute authorized the Secretary of the Treasury "to prescribe the copper and zinc composition 'as he may deem appropriate' and as is 'necessary in order to assure an adequate supply of coins to meet national needs.' "[30] It was thus evident that there was no congressional interest to protect, benefit or regulate the copper fabricators. Although the challenged agency action had an adverse regulatory impact on the copper fabricators, who lost to the newly favored zinc producers a substantial

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[28] At oral argument, plaintiffs asserted that their claim was related to the statutory interest in protecting revenue. This is belied by their failure to challenge on appeal the Bureau's ruling that PET packaging adequately protects tax revenues. Moreover, they have not alleged how any reduction in revenues could inflict upon them an injury distinct from the generalized harm suffered by all citizens when the flow of revenues to the Treasury is restricted. There is no universal standing to assert this type of generalized claim. *See Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 473-75 (1982); *Capital Legal Foundation v. Commodity Credit Corp.*, 711 F.2d 253, 260 (D.C. Cir. 1983).

[29] 679 F.2d 951 (D.C. Cir. 1982).

[30] *Id.* at 952 (quoting 31 U.S.C. § 317(b) (1976)).

share of the government's coin metal purchases, the exercise of discretionary authority to reduce United States copper consumption for reasons totally unrelated to the competitive status of copper fabricators was insufficient to place the copper fabricators within the zone of regulated interests.

The similarities between *Copper & Brass Fabricators* and the instant case are striking. Here the Bureau has exercised its discretionary authority to permit use of a new class of distilled spirits packaging which protects tax revenue. GPI's position is thus analagous to that of the copper fabricators' trade association—it has potentially lost a share of its preexisting market. However, because the statutory parameters guiding the Bureau's exercise of regulatory authority are totally irrelevant to the competitive impact of the decision on those manufacturers selling the regulated substance, the plaintiffs fail to come within the zone of interests arguably protected, benefitted or regulated by Section 5301(a). GPI's injury, a potential loss of revenue due to increased competition from PET liquor bottles, plainly is not an interest which Congress authorized the Bureau to regulate or protect.

Our decision in *Control Data Corp. v. Baldridge*,[31] also demonstrates that the zone of interests test is not satisfied. In *Control Data* a group of automatic data processing equipment manufacturers challenged regulations promulgated by the Secretary of Commerce that established certain technical specifications to which automatic data processing equipment had to conform in order to compete for government procurement contracts. Because the standards were similar to those then met by one segment of the industry, the remaining segment suffered a potentially severe injury to its competitive position since it would have been forced to spend large sums of

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[31] 655 F.2d 283 (D.C. Cir.), *cert. denied*, 454 U.S. 881 (1981).

money to modify its equipment specifications in order to continue to compete in the government data processing market. The statute under which the regulations were enacted specifically authorized the government to set uniform technical standards, and to increase competition among suppliers.

Nevertheless, we held that the plaintiffs' claim was not within the relevant zone of interests. It was not sufficient that the plaintiffs were regulated by the agency rules to the extent that they had to conform to the applicable technical specifications in order to compete in a particular market. Rather the plaintiffs were required to show that the interest allegedly injured—their competitive status as data processing equipment manufacturers—was an interest which Congress at least arguably had required the agency to protect or regulate. The statute authorized the agency to establish uniform technical specifications and promote industry competition, but only to the extent necessary to produce the lowest possible procurement prices for the United States Government.[32] The regulatory impact was only the means through which the single statutory end was promoted. Thus, there was no indication that Congress intended to place the plaintiffs within the zone of interests protected or regulated by the statute.

Like the manufacturers in *Control Data*, GPI has potentially suffered an injury to its competitive interests. The statute authorizing agency action indicates a congressional interest to regulate only a specific narrow governmental interest—protection of tax revenues—similar to the intent to reduce procurement costs in *Control Data*. Section 5301(a) is not a general mandate to monitor or protect the competitive status or financial health of the affected industry. Because there are no indicia that these competitive interests were to be regulated by the Bureau

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[32] *Id.* at 295.

under Section 5301(a), the plaintiff's injury is not arguably within the zone of interests, as required by the Supreme Court.[33]

This result is consistent with the general guidelines established by our other cases discussing the zone of interests standard.[34] The plaintiffs have advanced no compelling reasons why this prudential standing barrier should be relaxed. Without disparaging the genuineness of GPI's attempt to rectify alleged procedural irregularities in the Bureau's rulemaking, the interest which propelled it into the courts, preservation of a de facto dominant market position, is simply not one which Section 5301(a) was intended to protect or regulate. In these circumstances we hold that the plaintiffs lack standing to challenge the procedural validity of the Bureau's decision to permit distillers to package distilled spirits in PET bottles.[35]

B. *Environmental Claim*

The National Environmental Policy Act ("NEPA") requires Federal agencies to compile a complete environ-

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[33] *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 153 (1970).

[34] *See, e.g., Tax Aanalysts & Advocates v. Blumenthal*, 566 F.2d 130, 143 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) (domestic oil producers' competitive interests not protected under Internal Revenue Code); *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 915 (1980) (injuries to health and environmental interests were not protected by legislation intended solely to improve government property procurement and administration). GPI's claim is unlike those where the protected interest allegedly injured was discernible from the relevant statute as a regulatory objective. *See Howes Leather Co. v. Carmen*, 680 F.2d 818, 820-21 (D.C. Cir. 1982).

[35] *Cf. Capital Legal Foundation v. Commodity Credit Corp.*, 711 F.2d 253 (D.C. Cir. 1983) (organization which was denied opportunity to comment due to allegedly illegal administrative procedures was nevertheless outside relevant zone of interests).

mental impact statement on all "major Federal actions significantly affecting the quality of the human environment." [36] That report must consider, *inter alia*, the "environmental impact of the proposed action" and "any adverse environmental effects which cannot be avoided should the proposal be implemented." [37]

In discharging this statutory responsibility the Bureau prepared an environmental assessment of its decision to permit the use of PET liquor bottles. The assessment considered written comments raised by plaintiffs and others in response to the agency's public solicitation of comments on the potential environmental effects associated with use of PET liquor bottles. It concluded that approval of PET liquor bottles would not cause a significant environmental effect, and that no environmental impact statement was necessary. The district court upheld the legality of the Bureau's decision not to file an environmental impact statement based on the factors it considered.

The plaintiffs have not appealed this finding.[38] Rather, they argue that the Bureau erred by failing to consider an entirely separate impact which plaintiffs neglected to bring to the Bureau's attention during the written comment process. Specifically, the plaintiffs claim that a deranged criminal could inject poisons through the plastic walls of PET bottles, thus dangerously affecting human health. They suggest that the Bureau's omission to evaluate this alleged environmental effect was fatal to the Bureau's decision not to prepare an environmental im-

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[36] *See* 42 U.S.C. § 4332(2)(C) (1976).

[37] *Id.* § 433(2)(C)(i)-(ii).

[38] The plaintiffs have standing to raise this issue since plaintiff William W. Sadd alleged that he may consume distilled spirits packaged in PET, potentially subjecting him to health injuries resulting from contaminated liquor in compromised PET bottles. That injury, if cognizable as an environmental effect, would fall within the zone of protected interests under NEPA.

pact statement. The district court rejected this claim on the ground that the plaintiffs had failed to bring it to the Bureau's attention before release of the environmental assessment.

We reject the plaintiffs' NEPA claim as specious. No cognizable *environmental* effect is implicated by the introduction of a new plastic container into the market place merely because it may be susceptible to tampering. The policies served by NEPA are too important to be diluted as plaintiffs would have us do.[39] The Supreme Court has cautioned that

> NEPA does not require the agency to assess *every* impact or effect of its proposed action, but only the impact or effect on the environment. If we were to seize the word "environmental" out of its context and give it the broadest possible definition, the words 'adverse environmental effects' might embrace virtually any consequence of a governmental action that someone thought "adverse." [40]

By claiming that injury caused by ingestion of criminally adulterated food is an adverse environmental impact, the plaintiffs offer a definition of environment even broader than that rejected by the Supreme Court, extending the scope of "environment" well beyond any reasonable interpretation of the "natural and physical environment" [41] encompassed under NEPA.

The plaintiffs contend that NEPA requires consideration of environmental effects caused by reasonably foreseeable criminal acts of third parties. However, mere foreseeability does not trigger a duty to consider an alleged environmental effect. The limits to which NEPA's

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[39] *Metropolitan Edison Co. v. People Against Nuclear Energy*, 103 S. Ct. 1556, 1562 (1983).

[40] *Id.* at 1560.

[41] 40 C.F.R. § 1508.14 (1983).

causal chain may be stretched before breaking must be defined by the policies and legislative intent behind NEPA.[42] NEPA is meant to supplement federal agencies' other nonenvironmental objectives,[43] not to transplant specific regulatory burdens from those expert agencies otherwise authorized to redress specific nonenvironmental problems and pointlessly to reimpose those objectives on other unqualified agencies. In this case the FDA already has the specific statutory authority to address issues of tamperability. Several provisions of the Federal Food, Drug, and Cosmetic Act prohibit "adulteration" of food, which includes the addition of "any poisonous or deleterious substance which may render it injurious to health."[44] The Federal Anti-Tampering Act[45] makes it a federal crime to inject poison in foods. That Act specifically empowers the FDA to investigate violations of the Act involving products subject to FDA regulation,[46] such as liquor sold in PET bottles. In light of this specific congressionally conferred FDA mandate to control tampering with foods, drugs, and other consumer products, it would be absurd to hold that susceptibility to tampering is an environmental health risk which the Bureau and every other agency must consider in making an environmental assessment.

Hanly v. Kleindienst[47] is not to the contrary. This case and its progeny establish only that NEPA protects

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[42] *Metropolitan Edison Co. v. People Against Nuclear Energy*, 103 S. Ct. at 1561 n.7.

[43] *See* 42 U.S.C. § 4335 (1976).

[44] 21 U.S.C. § 331(b), (k) (1983).

[45] 97 Stat. 831 (13 Oct. 1983).

[46] *Id.* at 832; *see* 18 U.S.C.A. § 1365(f) (Supp. Pamphlet 1966-1983).

[47] 471 F.2d 823, 834 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973). *See also Hanly v. Mitchell*, 460 F.2d 640, 647 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972).

quality of life for city residents.[48] In *Hanly*, residents of a neighborhood objected to the concentrated criminal activity that could take place in the immediate vicinity of a new jail. There is no similarity between that drastic and localized change in a specific neighborhood locale, and the diffused, generalized health effects said to occur in this case, where millions of plastic food and drug containers are already marketed nationwide. We seriously doubt whether Congress fashioned NEPA as an administrative incarnation of the policeman's squad car, roving the streets in search of sporadic criminal activity which may occasionally occur in the aftermath of an agency action, there to arrest the criminal in the name of "environmental protection."

A decision that no significant environmental impact will occur is buttressed by the conformity of the proposed federal action to federal regulations governing other aspects of that action's interrelationship with the physical environment.[49] The FDA has previously rejected contentions that risk of tampering by injection through plastic-walled drug containers is significant.[50] Thus, the Bureau's failure to consider tamperability would not necessarily require compilation of an environmental impact statement.

Moreover, social side effects of agency action, standing alone, do not require development of an environmental impact statement. Applicable regulations state that

> *economic or social effects are not intended by themselves to require preparation of an environmental*

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[48] *See Realty Income Trust, Inc. v. Eckerd*, 564 F.2d 447, 452 n.10 (D.C. Cir. 1977).

[49] *See Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 861 (9th Cir. 1982); *Maryland-National Capital Parks & Planning Comm'n v. U.S. Postal Serv.*, 487 F.2d 1029, 1036-37 (D.C. Cir. 1973).

[50] *See* 48 Fed. Reg. 16,658, 16,662 (1982).

> *impact statement.* When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.[51]

The Bureau has already ruled that the potential physical and natural consequences of PET approval, such as those raised by plaintiffs and others in their written comments, do not require an environmental impact statement. The plaintiffs do not now challenge the district court's unqualified approval of the Bureau's treatment of these points. Thus, even if, contrary to our holding, the possibility of such minor social side effects as criminal tampering activity could be considered environmental impacts, that possibility would not tip the scale to require preparation of an environmental impact statement.[52]

Finally, the untimely manner in which plaintiffs raised the issue of tamperability also precludes us from overturning the Bureau's decision not to file an impact statement. The plaintiffs made no attempt to raise this claim until the final weeks of October 1982, at least eight months after the written comment period had expired, and less than two weeks before the environmental assessment was to be released. Even then, the plaintiffs' efforts to inform the Bureau of these issues, which apparently took the form of attempts "to schedule a meeting," [53] did not actually inform the Bureau of this risk. Consequently,

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[51] 40 C.F.R. § 1508.14 (1983).

[52] *See Como-Falcon Community Coalition, Inc. v. United States Dep't of Labor*, 609 F.2d 342, 345 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980); *Goodman Group, Inc. v. Dishroom*, 679 F.2d 182, 185 (9th Cir. 1982); *Image of Greater San Antonio, Texas v. Brown*, 570 F.2d 517, 522 (5th Cir. 1978); *National Ass'n of Government Employees v. Rumsfeld*, 413 F. Supp. 1224, 1230 (D.D.C. 1976), *aff'd mem.*, 556 F.2d 76 (D.C. Cir. 1977).

[53] Brief for Appellants at 28.

the district court found that the plaintiffs failed to raise the issue with the Bureau before release of the environmental assessment. On appeal, the plaintiffs have offered no factual basis on which to overturn this finding. Failure to raise the claim or to seek reconsideration of the environmental assessment precludes the plaintiffs from now raising the issue.[54]

The plaintiffs' only justification for their tardy attempts to notify the Bureau is that container tamperability could not reasonably have been anticipated prior to the close of the written comment period when tampering of other consumer products briefly became the focus of national publicity. We doubt that the unrelated, highly publicized incidents of tampering relied upon by the plaintiffs suddenly brought the tamperability of PET within the realm of realistically probable consequences. But even accepting this much, the plaintiffs' argument appears to be that the Bureau had a mandatory duty to supplement its environmental assessment. However, such a duty is triggered only when the available new information is sig-

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[54] *Recreational Vehicle Industry Ass'n v. EPA*, 653 F.2d 562, 573 (D.C. Cir. 1981); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. 1973), *cert. denied*, 417 U.S. 921 (1974). Cases cited by plaintiffs for the opposite proposition are readily distinguishable. Unlike *Athlone Industries, Inc. v. Consumer Product Safety Comm'n*, 707 F.2d 1485 (D.C. Cir. 1983), exhaustion of administrative remedies was not obviously futile and would have served several policies underlying the exhaustion doctrine, including granting the agency an opportunity to apply its expertise and discretion to GPI's admittedly novel claim. Dictum in *Izaac Walton League of Am. v. Marsh*, 655 F.2d 346, 369 n.56 (D.C. Cir.), *cert. denied*, 454 U.S. 1092 (1981) does not even discuss the exhaustion doctrine. *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1384-85 (2d Cir.), *cert. denied*, 434 U.S. 1064 (1978) permitted new evidence to be considered when the necessity of presenting the evidence was not apparent until after release of the agency's environmental evaluation, and was necessary to rebut other agency findings in the environmental impact statement. In this case, the significance of tamperability, if relevant at all, was not dependent upon other previously undisclosed evaluations made in the environmental assessment.

nificant.[55] Significance is based on a variety of factors including the empirical value of the new evidence and its potential effect on the agency's other calculations.[56] Here, the generalized threat of tampering was of questionable value indeed. Although plastic containers had been marketed for years, the plaintiffs' concerns were not triggered by the release of a significant study on the occurrence of tampering with plastic beverage containers, but only by the weak anecdotal evidence that other consumer products are currently subject to tampering. This minimal information was offered only at the conclusion of the administrative process, when agency attention had certainly shifted from evaluation of comments to final preparation and drafting of the assessment. The Supreme Court has cautioned against upsetting well-considered agency decisions based on scanty new evidence of alleged problems, and our court has been careful to follow its warning:

> Administrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated [and, we might add, the time the decision is judicially reviewed]. . . . If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening.[57]

The plaintiffs' allegations of tamperability are neither substantially based, nor were they ever brought to the attention of the agency. The occurrence of unsimilar

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[55] *See Friends of the Rivers v. Federal Energy Reg. Comm'n*, 720 F.2d 93, 109 (D.C. Cir. 1983).

[56] *Id.*

[57] *Id.* (quoting *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 554-55 (1978)).

tampering incidents at the conclusion of the agency decision making process forms no basis for remanding this proceeding to the Bureau for supplementation of its environmental assessment.

III. Conclusion

The Bureau of Alcohol, Tobacco and Firearms administratively cleared the packaging of distilled spirits in PET bottles after determining that PET packaging will adequately protect United States liquor tax revenues. In this appeal GPI does not object to this specific conclusion, but seeks instead to redress the potential injury to its competitive status by attacking the Bureau's decision, made without notice and comment, to amend its rules to require advance FDA approval of new packaging materials. However, GPI's competitive injury is totally dissimilar to the narrow zone of interests contemplated by the statute relied upon by GPI, which focuses on the protection of tax revenues and not the regulation of industry competition. That disjunction between injury and statutorily grounded zone of interests precludes GPI's standing to challenge the process adopted by the Bureau to amend its rules.

The plaintiffs' belated alternative attempt to attack the Bureau's decision as environmentally unsound based on purported new evidence of tampering is transparently flawed. Although tampering may pose a consumer health risk, it is definitely not an environmental consequence under any reasonable interpretation of the National Environmental Policy Act. Even if it were, the evidence of the harm was insubstantial, and never placed squarely before the agency.

The plaintiffs have advanced no legitimate grounds for interfering with the Bureau's exercise of its authority to permit distillers to package distilled spirits in PET bottles. The decision of the district court is

Affirmed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-3142

GLASS PACKAGING INSTITUTE, *et al.*,
Plaintiffs,

v.

DONALD T. REGAN, *et al.*,
Defendants.

[Filed Mar. 3, 1983]

MEMORANDUM OPINION

Plaintiffs Glass Packaging Institute, a trade association of manufacturers of glass bottles, and William W. Sadd filed suit on November 3, 1982, against Secretary Regan in his supervisory capacity of the Bureau of Alcohol, Tobacco, and Firearms (BATF) to prevent the introduction of plastic containers for distilled spirits. Plaintiffs sought a temporary restraining order to block the approval of plastic containers because BATF had failed to conduct an informal rulemaking proceeding, to prepare an environmental impact statement (EIS), and to determine whether plastic was a suitable container for distilled spirits. On November 4, 1982, plaintiffs' application for a temporary restraining order was denied and an oral opinion was issued* Shortly thereafter, BATF

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* At the hearing on plaintiffs' application for a temporary restraining order, the Court granted the oral motion to intervene of the Society of the Plastics Industry, Inc. (SPI). Because of plain-

made the determination that plastic was a suitable container for distilled spirits. *See* Industry Circular No. 82-14 (Nov. 12, 1982).

This matter is now before the Court on defendants' motion for summary judgment.** While summary judgment should be employed to avoid useless trials where there are no genuine issues of fact in dispute, *see* Fed. R. Civ. P. 56, "summary judgment is a lethal weapon, and courts must be mindful of its aims and targets and beware of overkill in its use." *Brunswick Corp. v. Vineburg*, 370 F.2d 605, 612 (5th Cir. 1967). In ruling on a motion for summary judgment, a court should confine its inquiry to determining whether a genuine, triable issue of fact exists, and should not attempt to resolve prematurely bonafide factual disputes under the guise of a Rule 56 disposition. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). It is clear that the moving party bears the burden of demonstrating that there are no genuine issues of material fact and that the movant is accordingly entitled to judgment as a matter of law. *See Bloomgarden v. Coyer*, 479 F.2d 201, 206-07 (D.C. Cir. 1973); *Nyhus v. Travel Management Corp.*, 466 F.2d 440, 442 (D.C. Cir. 1972). Despite these cautionary principles, defendants are entitled to summary judgment for the ensuing reasons.

DISCUSSION

Before discussing the challenges to the Administrative Procedure Act (APA) and the National Environmental

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tiffs' view that the granting of the oral motion did not admit SPI a party in this litigation, the Court granted SPI's written motion to intervene on December 27, 1982, and SPI is an intervenor-defendant in this litigation.

** Plaintiffs have filed a motion for preliminary injunctive relief. The disposition of defendants' motion for summary judgment necessitates that plaintiffs' motion for a preliminary injunction must be denied.

Policy Act (NEPA) to the approval by BATF of plastic containers for distilled spirits, it is important to consider what issues are no longer relevant because of actions that followed the denial of plaintiffs' application for a temporary restraining order. There are three issues which no longer have any bearing on the disposition of the instant suit. First, the Government's objections to plaintiffs' standing to raise the APA and NEPA claims have been satisfied by the allegations contained in the amended complaint. Second, plaintiffs have conceded that their claim concerning BATF's obligation to find plastic containers suitable for distilled spirits has been mooted by the BATF's determination of suitability on November 12, 1982. Third, plaintiffs have abandoned their challenge to the BATF's amendment to the definition of the term "liquor bottle." * Plaintiffs assert that because BATF has now recognized its erroneous view that determinations of suitability and compliance with NEPA were unnecessary before plastic containers could be used for distilled spirits, they have modified their argument to challenge the actual approval by BATF of plastic containers on APA and NEPA grounds. Apparently, plaintiffs failure to fully understand BATF's established role in approving new containers for distilled spirits led them to file a groundless application for a temporary restraining order due to an amendment to the definition of the term "liquor bottle." This amendment was nothing more than a policy statement of interpretive rule concerning the BATF's longstanding practice to delegate health con-

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* BATF's final rule that became effective on November 4, 1982, defined the term liquor bottle as follows:

> A bottle made of glass or earthware, or of other suitable material approved by the Food and Drug Administration, which has been designed or is intended for use as a container for distilled spirits for sale for beverage purposes and which has been determined by the Director to adequately protect the revenue.

See 47 Fed. Reg. 43, 947 (1982).

cerns to the Food and Drug Administration (FDA) and to incorporate the FDA's findings into a suitability determination. Plaintiffs will not be permitted to convey the misimpression that it was anyone other than they who precipitated this suit prematurely due to their misunderstanding of the administrative process.

APA CLAIM

Plaintiffs maintain that BATF's approval of plastic containers should have been conducted through an informal rulemaking for two reasons. First, plaintiffs assert that the pervasive usage of the terminology "by regulation" in the statutes governing BATF's regulation of distilled spirits requires BATF to conduct an informal rulemaking before a new kind of container is approved. *See, e.g., Spring Mills, Inc. v. CPSC*, 434 F. Supp. 416, 430 (D.S.C. 1977). Second, plaintiffs maintain that BATF's endorsement of plastic containers for distilled spirits was a substantive rule that should have been formulated through an informal rulemaking. Neither argument is persuasive.

Plaintiffs rely on three statutory provisions to support their argument that Congress intended that an informal rulemaking would be held before BATF approved any new kind of container for distilled spirit. One of these provisions, however, is irrelevant because it applies exclusively to the industrial use of distilled spirits. *See* 26 U.S.C. § 5206(d) (1976). Another of the statutory provisions authorizes, but hardly mandates, BATF to promulgate regulations through informal rulemaking.* *See*

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* 26 U.S.C. § 5301(a) (Supp. IV 1980) provides:

> Whenever in his judgment such action is necessary to protect the revenue, the Secretary is authorized, by the regulations prescribed by him and permits issued thereunder if required by him—
>
> (1) to regulate the kind, size, branding, marking, sale, resale, possession, use, and reuse of containers . . . designed or

26 U.S.C. § 5301(a) (Supp. IV 1980). Hence, plaintiffs are left with a single statutory provision the sole purpose of which is to define the words "approved containers." *See* 26 U.S.C. 5001(a)(13) (Supp. IV 1980). Consequently, the presence of a solitary definitional provision that refers to the words "by regulation" falls far short of constituting pervasive usage of these words throughout the pertinent statute that would require BATF to conduct an informal rulemaking. Moreover, the Court declines to employ a purely definitional provision to override the statutory section that explicitly applies to BATF rulemaking and clearly acknowledges BATF's discretion to promulgate rules regarding the nature of containers for distilled spirits. *See* 26 U.S.C. § 5301(a) (Supp. IV 1980). In fact, Section 5301(a) specifically endorses BATF's issuance of permits that regulate the kinds of containers for distilled spirits, the precise manner in which BATF approved the use of plastic containers.

Despite the apparent congressional intent to permit BATF to promulgate rules and regulations concerning containers for distilled spirits at its discretion, plaintiffs maintain that BATF's approval of plastic containers was a substantive rule that required an informal rulemaking under the APA. Because the BATF ruling constitutes an interpretive rule, however, it is exempt from the notice and comment requirements of the APA. *See* 5 U.S.C. § 553(b)(3)(A) (1976). BATF has consistently viewed its rulings as official interpretations of the law that have no binding legal effect.* It has been a longstanding practice of the BATF to approve new materials for liquor

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intended for use for the sale of distilled spirits . . . for other than industrial use.

* 27 C.F.R. § 71.41(d)(2)(i)(A) (1982) provides that an ATF ruling "is an official interpretation by the Bureau that has been published . . . for the information and guidance of taxpayers, Bureau officials, and others concerned. ATF rulings represent the conclusions of the Bureau on the application of the law to the entire state of facts involved."

containers on a case-by-case basis through the issuance of interpretive rulings.** *See* Affidavit of William T. Drake, Assistant Director for Regulatory Enforcement, ¶ 4. *See, e.g.*, ATF Rulings 61-180 (aluminum), 66-193 (aluminum and tinplate), 70-36 (aluminum, tinplate, tinfree steel, and similar metals). As a result, BATF's approval of plastic containers for distilled spirits through an interpretive ruling followed a well-established administrative practice. BATF's characterization of its approval of materials for liquor containers as an interpretive ruling is entitled to significant deference. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Cabais v. Egger*, 690 F.2d 234, 238 (D.C. Cir. 1982). Plaintiffs have failed to offer any justification beyond their desire to block the introduction of plastic containers to reject BATF's judgment. In addition, BATF's judgment is buttressed by the fact that its interpretive rulings are very similar to Internal Revenue Service (IRS) revenue rulings, *see* 26 C.F.R. § 601.601(d) & (e) (1982), that have been viewed as interpretive rules not subject to informal rulemaking. *See, e.g., Eastern Kentucky Welfare Rights Organization v. Simon*, 506 F.2d 1278 (D.C. Cir. 1974), *vacated on other grounds*, 426 U.S. 26 (1976). In sum, the congressional intent to place the decision to issue regulations in the BATF's discretion, the substantial deference merited by BATF's judgment to employ interpretive rulings to expand the list "of other suitable materials" for liquor bottles, and the similarity of BATF rulings to IRS revenue rulings that have been construed as interpretive rules exempt from the rulemaking requirements of the APA all compel the holding that BATF's approval of plastic containers for distilled spirits did not require notice and comment rulemaking.

** These interpretive rulings refine the definition of "liquor bottle" which has been defined by regulation to be "made of glass or earthenware, or of other suitable material approved by the Director, designed or intended for use as a container for distilled spirits for sale for beverage purposes." 27 C.F.R. § 19.11 (1982).

NEPA CLAIM

It is undisputed that BATF's approval of plastic containers for distilled spirits will have some impact on the environment. Nevertheless, it is within BATF's discretion not to conduct an environmental impact statement (EIS) if its environmental assessment suggests that no significant environmental impact will occur. Although BATF is obligated to take a "hard look" at the environmental effects of its actions, its decision not to prepare an EIS "is judicially vulnerable only when the agency has abused its discretion or has acted arbitrarily." *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992, 1002 (D.C. Cir. 1979). *See Assure Competitive Transportation v. United States*, 635 F.2d 1301 (7th Cir. 1980). Plaintiffs challenge BATF's decision to do only an environmental assessment on three grounds: 1) the failure to consider adequately the production of hazardous gases due to the incineration of the plastic containers, the disposal of the solid wastes from these containers, and the energy consumption necessary for the production of the containers; 2) the failure to consider new evidence that plastic materials can be carcinogenic; and 3) the failure to mention the danger of tampering with plastic containers. A review of the administrative record demonstrates, however, that all of plaintiffs' objections are groundless.

Considering plaintiffs' first objection, BATF's environmental assessment carefully considered the environmental concerns of incineration of plastic containers, accumulation of solid waste, and the use of petrochemical resources. *See* Environmental Assessment of Polyethylene Terephthalate Liquor Bottles, at 16-17, 33-44 (Nov. 3, 1982). That BATF concluded that these environment effects were trivial is hardly surprising given the vast number of plastic containers presently utilized for foods and other beverages. As a result, the administrative record readily reflects that BATF took a "hard look" at the

aforementioned environmental concerns and properly concluded that preparation of an EIS was unnecessary.

Plaintiffs' second objection is equally groundless. Plaintiffs assert that BATF failed to consider new scientific evidence that plastic containers may be carcinogenic.* Yet, plaintiffs are attempting to resurrect an argument that has been repeatedly rejected. The FDA approved the use of plastic containers almost ten years ago. Only two weeks prior to the release of the environmental assessment, the FDA rejected the petition of the Natural Resources Defense Council to reconsider the approval of plastic containers due to allegedly new scientific evidence regarding potential carcinogenicity. Plaintiffs have failed to articulate why the FDA's scientific judgment should be rejected. Thus, the concern with the potential carcinogenicity of plastic materials has been repeatedly considered and resoundingly dismissed. An EIS is hardly necessitated by this concern.

Plaintiffs advance as their final objection the concern that third parties may be able to tamper with plastic containers. Plaintiffs have seized upon the Tylenol poisonings as an after-thought to block the introduction of plastic containers. Because of plaintiffs' failure to raise this concern before the release of the environmental assessment and their failure to file a petition for reconsideration based on this concern, plaintiffs are not entitled to raise the tampering issue now to have the administrative record remanded. *See, e.g., Recreation Vehicle Industry Ass'n v. EPA*, 653 F.2d 562, 573 (D.C. Cir. 1981). Moreover, it is dubious whether a concern with the criminal acts of third parties is even cognizable under NEPA. It is undisputed that plaintiffs have the ability, if they are genuinely concerned, to petition the FDA to assess

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* Given BATF's limited role in assessing only whether plastic containers will "protect the revenue," there can be no dispute that BATF was entitled to rely on the scientific expertise of the FDA in determining whether plastic containers could be carcinogenic.

the safety of plastic containers in light of the concern with tampering.

CONCLUSION

There are no genuine issues of material fact present in this action and defendants are entitled to summary judgment. An Order consistent with this Memorandum Opinion has been issued.

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
United States District Judge

March 2, 1983

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-3142

GLASS PACKAGING INSTITUTE, *et al.*,
Plaintiffs,

v.

DONALD T. REGAN, *et al.*,
Defendants.

[Filed Feb. 28, 1983]

ORDER

Upon consideration of plaintiffs' motion for a preliminary injunction, defendants' motion for summary judgment, the respective oppositions, the accompanying memoranda of law, and the entire record herein, it is this 28th day of February, 1983,

ORDERED that plaintiffs' motion for a preliminary injunction be, and hereby is, denied; and it is further

ORDERED that defendants' motion for summary judgment be, and hereby is, granted; and it is further

ORDERED that the above-captioned case be, and hereby is, dismissed with prejudice.

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-3142

GLASS PACKAGING INSTITUTE, *et al.*,
Plaintiffs,

v.

DONALD T. REGAN, *et al.*,
Defendants.

NOTICE OF APPEAL

Notice is hereby given this 31st day of March, 1983, that Plaintiffs Glass Packaging Institute and William W. Sadd hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the Order of this Court entered February 28, 1983, granting Defendants' Motion for Summary Judgment and denying Plaintiffs' Motion for Preliminary Injunction and ordering that the above-captioned case be dismissed.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

September Term, 1983

No. 83-1390

Civil Action No. 82-03142

GLASS PACKAGING INSTITUTE, *et al.*,
Appellants

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*

[Filed Dec. 12, 1983]

Before: Wilkey and Ginsburg, Circuit Judges; and MacKinnon, Senior Circuit Judge

ORDER

Upon consideration of appellants' motion for leave to file a supplemental brief addressing the question of standing, and of appellants' lodged supplemental brief, it is

ORDERED, by the Court, that appellants' aforesaid motion is granted and the Clerk is directed to file appellants' supplemental brief and to enter same on the docket. It is

FURTHER ORDERED, by the Court, that appellees may file a response to appellants' supplemental brief within ten (10) days from the date of this order.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

September Term, 1983

Civil Action No. 82-03142

No. 83-1390

GLASS PACKAGING INSTITUTE, *et al.*,
Appellants

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*

[Filed Jan. 17, 1984]

Before: Wilkey and Ginsburg, Circuit Judges; and MacKinnon, Senior Circuit Judge

ORDER

Upon consideration of appellees' (federal) motion for leave to file motion for enlargement of time, of appellees' lodged motion for extension of time [to file supplemental brief], and it appearing that appellees' supplemental brief has been received in the Clerk's Office, it is

ORDERED, by the Court, that appellees' aforesaid motion is granted and the Clerk is directed to file appellees' lodged motion for extension of time and appellees' lodged supplemental brief and to enter same on the docket.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

No. 84-362

(3)

Office - Supreme Court, U.S.
FILED
NOV 1 1984
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

GLASS PACKAGING INSTITUTE, ET AL., PETITIONERS

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-362

GLASS PACKAGING INSTITUTE, ET AL., PETITIONERS

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioners contest the court of appeals' ruling that they lack standing to challenge the decision of the Bureau of Alcohol, Tobacco and Firearms (BATF) to allow liquor to be sold in plastic polyethylene terephthalate (PET) bottles.

1. The Secretary of the Treasury is authorized to regulate the kinds of containers used to bottle distilled spirits "whenever in his judgment such action is necessary to protect the revenue" (26 U.S.C. 5301(a)).[1] In 1955, the Secretary promulgated regulations permitting distillers to use liquor bottles "made of glass, or earthenware, or other suitable material approved by the Director [of the BATF]" (26 C.F.R. 175.17 (1955)).

[1]As the court of appeals noted (Pet. App. A4), the integrity of the materials in which liquor is packaged can have a direct effect on the volume of alcohol and, consequently, on the amount of taxes to be collected by the United States.

The Food and Drug Administration also regulates the types of packaging that may be used for alcoholic beverages under the authority of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 *et seq.* In 1973, the FDA, after notice and comment rulemaking, approved the use of PET plastic in containers used for alcoholic beverages not exceeding 50% alcohol by volume. See Pet. App. A4.

On October 5, 1982, the BATF issued a final rule, effective November 5, 1982, amending its definition of permissible liquor bottles to include bottles "made of glass or earthenware, or of other suitable material approved by the Food and Drug Administration * * * and which has been determined by the Director [of the BATF] to adequately protect the revenue" (27 C.F.R. 19.11). One day before the final rule was to become effective, petitioners, the Glass Packaging Institute and its president, William W. Sadd, brought this action in the United States District Court for the District of Columbia to enjoin the BATF from approving PET liquor bottles. Petitioners argued, inter alia, that the BATF had violated the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. 553, by failing to follow the Act's notice and comment procedures. The district court dismissed petitioners' suit on the merits (Pet. App. A24-A32). Among other things, the court held that the BATF's approval of PET was an interpretative rule, exempt from the APA's notice and comment rulemaking requirements (*id.* at A27-A29).

2. The court of appeals affirmed the district court's dismissal of the action without reaching the merits (Pet. App. A1-A23). The court noted that the only interest asserted by petitioners was " 'the right to market distilled beverage containers free of competition from containers approved in an illegal fashion' " (*id.* at A10 (citation omitted)). Concluding that the statute invoked by petitioners, 26 U.S.C. 5301(a), was drafted solely to enable the Secretary of the

Treasury to protect the revenue and not to regulate competition among liquor bottle manufacturers (Pet. App. A11), the court held that petitioners lacked standing because their asserted interest was not within the zone of interests to be protected or regulated by the statute in question (*id.* at A10-A15).

3. Petitioners do not challenge the court of appeals' conclusion that Congress's sole purpose in enacting 26 U.S.C. 5301(a) was the protection of the federal revenue. In addition, petitioners do not argue that they have any claim related to the statutory interest in protecting the revenue.[2] Instead, petitioners' principal argument is that this Court should overrule or clarify the zone of interests test because, as applied in this case, the result may be that no one has standing to challenge the BATF's approval of PET bottles (Pet. 13). There is no merit to this argument, and review by this Court is not warranted.

a. Whatever petitioners may think of the test, the requirement that a plaintiff demonstrate that his asserted injury is within the zone of interests to be protected or regulated by the statutory or constitutional guarantee in question is now firmly established in this Court's standing jurisprudence. See, *e.g.*, *Allen* v. *Wright*, No. 81-757 (July 3, 1984), slip op. 12; *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 n.6 (1979); *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 320-321 n.3 (1977); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39 n.19 (1976); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 227

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[2]Petitioners advanced such a claim at oral argument in the court of appeals, but the court rejected it as groundless (Pet. App. A12 n.28).

n.16 (1974); *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686 n.13 (1973); *Sierra Club* v. *Morton*, 405 U.S. 727, 733 & n.5 (1972); *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 620 (1971); *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45, 46 (1970); *Barlow* v. *Collins*, 397 U.S. 159 (1970); *Ass'n of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970). Moreover, the zone of interests test serves an essential function in the demarcation of the proper roles for courts and legislatures. The prudential limitations on standing, including the zone test, stem from "concerns 'about the proper — and properly limited — role of the courts in a democratic society.' " *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 80 (1978) (quoting *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975)). As the Court has explained (*id.* at 500):

> Without such [prudential] limitations — closely related to Art. III concerns but essentially matters of judicial self-governance — the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions * * *.

The zone of interests test is particularly well suited to address such concerns. As the District of Columbia Circuit has recognized (*Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130, 140 (1977), cert. denied, 434 U.S. 1086 (1978) (footnote omitted)):

> The zone test, by its very language, implicates the relationship between the legislative and judicial branches as the predominant factor in its operation — "the zone of interests to be protected or regulated by the *statute* . . . in question." Thus, the zone test serves the purpose of allowing courts to define those instances

when it believes the exercise of its power at the instigation of a particular party is not congruent with the mandate of the legislative branch in a particular subject area.

In the present case, there can be no doubt that the exercise of judicial power at the instigation of petitioners would "not [be] congruent with the mandate" of Congress as expressed in Section 5301(a) of the Internal Revenue Code. Indeed, this is a case in which there is no relationship whatsoever between petitioners' interests and the statute they have invoked.[3] To allow parties whose only interest is in protecting their competitive position to challenge action taken under a statute passed for the protection of the revenue — particularly in a case in which petitioners do not even allege that the BATF has not adequately protected the revenue — would needlessly inject the judiciary into matters that Congress clearly entrusted to the Secretary of the Treasury. Moreover, the fact that no one may have standing to challenge the BATF's decision is no reason to grant petitioners standing. See *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. at 227. The better-reasoned conclusion is that Congress intended to vest the Secretary of the Treasury with sole discretion to decide what types of packaging materials adequately protect the revenue.

b. Contrary to petitioners' argument (Pet. 10-11), the decision below does not conflict with this Court's decision in *Data Processing, supra*. *Data Processing* was predicated

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[3]Petitioners appear to suggest (Pet. 13-14) that they may invoke the APA as a basis for standing. But the APA contains its own zone of interests limitation; 5 U.S.C. 702 grants a right of judicial review to persons aggrieved "within the meaning of a relevant statute." As the court of appeals noted (Pet. App. A10), the statute invoked by petitioners in this case is 26 U.S.C. 5301(a), and petitioners are not aggrieved within the meaning of that statute.

on the finding that "Congress had arguably legislated against the competition that the petitioners sought to challenge." *Investment Co. Institute* v. *Camp*, 401 U.S. at 620. Here, by contrast, Congress has not even arguably legislated on the subject of competition among bottlemakers. Thus, the decision below is fully consistent with this Court's precedents.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

OCTOBER 1984

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[4]Petitioners contend (Pet. 15-18) that review is necessary because lower courts have not applied the zone test in a consistent fashion. But none of the cases cited by petitioners construes the statute at issue in this case; thus, this is a case of first impression. Cf. *Allen* v. *Wright*, slip op. 13 (The rules of standing "cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise."). In any event, petitioners' reliance on cases in which lower courts failed to apply the zone of interests test is no reason to grant review in a case in which the test was properly applied. Finally, petitioners' suggestion (Pet. 16) that the Eighth Circuit does not follow the zone of interests test is erroneous. See, *e.g.*, *Taylor* v. *Jones*, 653 F.2d 1193, 1207 (1981); *Churchill Truck Lines, Inc.* v. *United States*, 533 F.2d 411, 416-417 (1976).

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No. 84-362 (3)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

GLASS PACKAGING INSTITUTE, *et al.*,

Petitioners

v.

DONALD T. REGAN, *et al.*,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SOCIETY OF THE PLASTICS INDUSTRY, INC. IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether standing to obtain judicial review of an administrative agency's action may properly be denied to parties who assert interests they have conceded are not even arguably within the zone of interests protected by the statute pursuant to which the agency acted?

2. Whether this case presents any premise for the theory that the zone of interests standing test established by this Court requires clarification or abandonment?

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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SOCIETY OF THE PLASTICS INDUSTRY, INC.[1] IN OPPOSITION

STATEMENT OF THE CASE

This lawsuit, precipitated by the Bureau of Alcohol, Tobacco and Firearms' ("BATF") clearance of polyethylene terephthalate ("PET") as a material suitable for use in containers for distilled spirits, is simply the latest phase of an economic battle between the glass industry and the plastics industry. *See* App. at A-13, A-15, A-23, and A-29.[2]

Petitioners first challenged the clearance of PET liquor bottles in the United States District Court for the District of

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[1] In accordance with Rule 28.1 of the Rules of the Supreme Court, The Society of the Plastics Industry, Inc. states that it is a corporation with no parent companies, subsidiaries, or affiliates.

[2] "Pet." refers to the Petition for Certiorari. "App." refers to the Appendix to the Petition for Certiorari.

Columbia on three procedural and environmental grounds, none of which was found to have merit (App. at A-24-32), and two of which have been abandoned by the Petitioners during the appellate process. Pet. at 4 n.1; App. at A-7. The District Court's decision was appealed to the United States Court of Appeals for the District of Columbia Circuit where, during oral argument, the Court of Appeals *sua sponte* raised the issue of Petitioners' standing to obtain review of BATF's decision not to hold a notice and comment rule making proceeding prior to clearing PET liquor bottles. In response, Petitioners filed a brief arguing that their asserted interest, the right to market distilled beverage containers free of competition from containers approved in an allegedly illegal fashion, was within the zone of interests regulated by the relevant statute, Section 5301(a) of the Internal Revenue Code, 26 U.S.C. § 5301(a) (1976 and Supp. V 1981). *See* App. at A-10-11. The Court of Appeals concluded that Section 5301(a) was not intended to regulate competition among manufacturers of liquor bottles but, instead, was solely concerned with protection of the revenue. App. at A-14. Therefore, the Court of Appeals held that the Petitioners' "injury is not arguably within the zone of interests, as required by the Supreme Court." App. at A-15. The Court of Appeals did find that Petitioners had standing under the zone of interests test with respect to their claim under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*. (1976), although it determined this claim to be without merit. App. at A-16 n.38, A-22-23.

ARGUMENT

A. Introduction

The primary question before this Court is whether standing to obtain judicial review of an administrative agency's action may properly be denied to parties who assert interests conceded to be outside the zone of interests protected by the agency's statutory mandate. Petitioners no longer explicitly argue that they are within the zone of interests regulated by Section 5301(a).[3] Rather, they allege that failure to meet the

[3] While avoiding an explicit claim that their alleged competitive injury is arguably within the zone regulated by Section 5301(a) in apparent

zone test, by itself, is an insufficient basis for denying standing or, in the alternative, that the test should be clarified or overruled. Pet. at 7, 17.

The Society of the Plastics Industry, Inc. ("SPI") respectfully submits that the Petitioners have not shown any reason sufficient for this Court to review the decision of the Court of Appeals. The Court of Appeals correctly applied the zone of interests test established by this Court in *Association of Data Processing Service Organizations, Inc.* v. *Camp* (*Data Processing*), 397 U.S. 150, 153 (1970), and repeatedly reaffirmed by this Court. It reached the unassailable conclusion that Petitioners did not have standing to obtain review of BATF's action since Petitioners' alleged competitive injury was not even arguably within the zone of interests regulated by the revenue protection statute, Section 5301(a).

This case demonstrates why standing should be denied when a party does not meet the zone of interests test. Since the only remaining interest alleged by the Petitioners is the avoidance of competitive injury, they would have nothing relevant left to raise during any subsequent administrative proceeding.[4]

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recognition of the weakness of that position, Petitioners attempt to make the same point by implication in arguing that the application of the zone test by the Court of Appeals conflicts with this Court's application of the test in *Association of Data Processing Service Organizations, Inc.* v. *Camp* (*Data Processing*), 397 U.S. 150 (1970). *See* Pet. at 10-11. The absence of any conflict between this Court's application of the zone of interests test in *Data Processing* and the Court of Appeals' decision in this case is demonstrated in a subsequent section of this Brief (at 7-8). In any case, SPI respectfully submits that the Petitioners have admitted, by their omission of any explicit statement to the contrary, that their asserted competitive interest does not arguably fall within the zone protected by Section 5301(a).

[4] The District Court found that BATF's action in clearing PET liquor bottles was interpretive and that a notice and comment rule making proceeding was not required. App. at A-28-29. Since the Court of Appeals found that Petitioners lacked standing to challenge the procedure followed by BATF, it did not reach the question of whether a notice and comment rule making was required. *See* App. at A-8, A-15. Even if this Court were to accord Petitioners standing, a subsequent administrative proceeding would not be necessary unless the Court of Appeals were to reverse the District Court's decision on the merits.

Such a proceeding would be held to determine one issue, whether PET liquor bottles adequately protect the revenue, and Petitioners have already conceded this point. App. at A-7, A-23. If parties devoid of protected interests, such as Petitioners, are accorded standing, the result will be unwarranted and fruitless judicial intervention into administrative agencies' performance of their statutory mandates on behalf of parties who have no interest to advance, and no contribution to make, which is relevant to those mandates. Such a result would conflict with the policy underlying the zone of interests test — the recognition and preservation of the proper separation of powers integral to our system of government.

B. The Court of Appeals Properly Applied the Zone of Interests Test In Accordance With the Decisions of this Court

In *Data Processing* and its progeny,[5] the Court has indicated that, in addition to establishing injury in fact, the constitutional minimum for standing under Article III of the Constitution, a party seeking review of agency action must meet three prudential standing considerations:

1) " 'The plaintiff generally must assert his own legal rights and interests, and cannot rest his claim on the legal rights or interests of third parties . . . .' " *Valley Forge Christian College* v. *Americans United for Separation of Church and State* (*Valley Forge*), 454 U.S. 464, 474 (1982) (quoting *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975)).

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[5] *Allen* v. *Wright*, 468 U.S. _____, 104 S. Ct. 3315, 3325 (1984); *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464, 474-475 (1982); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 n.6 (1979); *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 320-21 n.3 (1977); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39 n.19 (1976); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 227 n.16 (1974); *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686 n.13 (1973); *Sierra Club* v. *Morton*, 405 U.S. 727, 733 & n.5 (1972); *Investment Company Institute* v. *Camp*, 401 U.S. 617, 620 (1971); *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45, 46 (1970); *Barlow* v. *Collins*, 397 U.S. 159 (1970).

2) The Court will refrain from adjudicating "'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." *Id.* at 475 (quoting *Warth* v. *Seldin*, 422 U.S. at 499-500).

3) The plaintiff's complaint must fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Id.* (quoting *Data Processing*, 397 U.S. at 153).

1. Petitioners Must Meet the Prudential As Well As the Constitutional Requirements for Standing

Petitioners contend that the prudential factors are not to be applied in all cases as a matter of course, quoting out of context language from three decisions of this Court. Pet. at 8. This Court, however, has identified only two circumstances in which courts may refrain from applying the prudential considerations. *See Warth* v. *Seldin*, 422 U.S. at 509. "Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.'" *Gladstone, Realtors* v. *Village of Bellwood* (*Gladstone*), 441 U.S. 91, 100 (1979) (quoting *Warth* v. *Seldin*, 422 U.S. at 501). In addition, in constitutional cases, particularly those involving the First Amendment, this Court has allowed plaintiffs to bring causes of action on behalf of third parties where the parties whose rights the plaintiffs are asserting would be precluded from challenging a law *Warth* v. *Seldin*, 422 U.S. at 510; *Eisenstadt* v. *Baird*, 405 U.S. 438, 444-446, 445 n.5 (1972).

Placed in the context of the cases from which it is derived, the language of this Court quoted by Petitioners (Pet. at 8) does not endow courts with discretion to accord standing to a party who fails to meet the prudential tests. In *Valley Forge*, the Court stated that the Article III standing requirement of injury in fact "states a limitation on judicial power, not merely a factor to be balanced in the weighing of so-called 'prudential' considerations." 454 U.S. at 475. The Court was not suggesting that application of the prudential tests is optional, but, instead, that fulfillment of the prudential standards does not confer constitutional

standing. *Id.* In *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.* (*Duke Power*), 438 U.S. 59 (1978), the Court indicated only that the prudential third-party standing limitation should not be applied "to all cases as a matter of course," specifically not in cases "[w]here a party champions his own rights." 438 U.S. at 80. The statement in the footnote in the *Gladstone* case that "[t]here are other nonconstitutional limitations on standing to be applied in appropriate circumstances," 441 U.S. at 100 n.6, constitutes the Court's recognition that the zone of interests test is a third prudential standing test, in addition to the limitations relating to generalized grievances and the rights of third parties. 441 U.S. at 100 and 100 n.6. The eminently logical proposition suggested in *Gladstone* and in *Duke Power* that not every case will have facts implicating all of the prudential standing tests is not a sufficient predicate for the conclusion that this Court has authorized standing where a party admittedly does not meet one of the tests, a holding for which Petitioners are unable to cite a single decision of this Court.

2. The Court of Appeals Properly Applied the Zone of Interests Test

Petitioners maintain that the Court of Appeals' decision conflicts with *Data Processing* and its progeny on two grounds: (1) "the Court of Appeals utilized the zone of interests test, adopted by this Court to relax prudential restraints on standing to protest administrative action, in a manner which significantly curtails access to the courts for persons aggrieved by the unlawful action of a federal agency;" and (2) "by requiring Petitioners to demonstrate that the interest they asserted was intended to be regulated or protected by § 5301(a), the court below in effect revived the 'legal interest test' which the Supreme Court rejected as a test for standing." Pet. at 9. These contentions are without merit.

Petitioners have made no showing that the Court of Appeals' decision curtails judicial review by any persons other than those who, like Petitioners, assert no interest so much as arguably within the zone regulated by the relevant statute. The zone of interests test articulated by this Court in *Data Processing*, and repeatedly reaffirmed in subsequent decisions (*see*

cases collected at note 5, *supra*), is intended to deny standing to such persons. *See, e.g., Valley Forge*, 454 U.S. at 475; *Gladstone*, 441 U.S. at 99-100 and 100 n.6. The contention that the Court of Appeals' decision will render many administrative decisions unreviewable is belied by the fact that the Court of Appeals accorded Petitioners standing on their moribund environmental claim. App. at A-16 n. 38.

Petitioners are correct in stating that *Data Processing* expanded the class of persons entitled to standing by replacing the legal interest test with the zone of interests test. 397 U.S. at 153-154. *Data Processing*, however, did not enunciate a rule of universal standing, immune from any prudential considerations. To the contrary, the Court in *Data Processing* evolved the zone of interests test (replacing the more restrictive legal interest test) *in addition to* the tests required by Article III of the Constitution. 397 U.S. at 153. *See* cases collected at note 5, *supra*. The Court simply enlarged the class of litigants by extending standing to parties whose interests are *arguably* within the protected *zone*, rather than only parties whose interests *are protected. See Data Processing*, 397 U.S. at 154. Since Petitioners are not even arguably within the relevant zone, they have no grounds for disagreement with the application of the zone test by the Court of Appeals.

Nor did the Court of Appeals' decision in this case revive the legal interest test. That test determined standing according to whether the plaintiff had an enforceable legal right based on an in-depth review on the merits. *See Id.* at 153, citing *Tennessee Electric Power Co.* v. *TVA*, 306 U.S. 118, 137-138 (1939). Far from applying the legal interest test superseded by this Court in *Data Processing*, the Court of Appeals conducted the appropriate zone of interests inquiry: "[The zone of interests] test 'requires some indicia — however slight — that the litigant before the court was intended to be protected, benefitted or regulated by the statute under which suit is brought.'" App. at A-10 (quoting *Copper & Brass Fabricators Council, Inc.* v. *Department of the Treasury*, 679 F.2d 951, 952 (D.C. Cir. 1982)). The Court of Appeals correctly concluded from the face of the relevant statute, Section 5301(a) of the Internal

Revenue Code, that Congress did not intend to protect or regulate competitive interests. App. at A-11.

Petitioners also contend that, if the Court of Appeals' analysis had been applied to the *Data Processing* facts, the Court of Appeals would not have arrived at the same conclusion as did this Court. Pet. at 10. Although unstated, the suggestion Petitioners seek to convey by this argument is that their asserted competitive interest falls within the zone regulated by Section 5301(a). SPI respectfully submits that the suggestion remains unstated by Petitioners because there is not a scintilla of evidence that Section 5301(a) was intended to regulate competition among liquor bottle manufacturers. *See* App. at A-11-15.

Petitioners assume that the Court of Appeals would have interpreted the statute at issue in *Data Processing*, Section 4 of the Bank Service Corporation Act of 1962, 12 U.S.C. § 1864 (1976) (amended 1982), as only regulating competition among banks because that is Petitioner's view of the statute's legislative history. This Court, however, did not share Petitioners' assessment of the legislative history. The Court found that Section 4 was aimed at preventing banks from engaging in a nonbanking activity, arguably bringing nonbank data processing competitors of banks within the zone of interests regulated by the statute. *Data Processing*, 397 U.S. at 155-156. By contrast, the Court of Appeals in this case found that "the statute authorizing agency action indicates a congressional interest to regulate only a specific narrow governmental interest — protection of tax revenues" (App. at A-14), a conclusion Petitioners do not contest. *See* Pet. at 10 n.9. The *Data Processing* facts are thus completely distinguishable from the facts of this case where there is no arguable intention to regulate competition by the relevant statute. App. at A-11.

3. Denial of Standing Based On the Zone of Interests Test Is In Accordance With the Decisions of this Court and the APA

Petitioners argue that standing cannot be denied on the basis of the zone of interests test alone because the Supreme Court has never done so. Pet. at 11. Whether the Court, through

the happenstance of the facts before it, has denied standing under the test is irrelevant; what is relevant is that the Court has consistently maintained that the test is required to be satisfied. *See* cases collected at note 5, *supra*.

Petitioners assert that the Court has found standing without applying the zone test when such application "arguably would have yielded a different result." Pet. at 11. The cases Petitioners cite in support of this position are inapposite.[6]

The Petitioners urge this Court to hold that, unless there are compelling circumstances precluding judicial review, a court may not deny standing based on the zone test where a party has standing under Article III. Pet. at 11-12. This position runs afoul of this Court's statements that the prudential standing tests must be met in addition to the constitutional tests. As the Court stated in *Gladstone*:

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[6] In *Bryant* v. *Yellen*, 447 U.S. 352 (1980), the zone test was applied by the Court of Appeals, and standing was found. *United States* v. *Imperial Irrigation District*, 559 F.2d 509, 523 (9th Cir. 1977), *modified*, 595 F.2d 524 (9th Cir. 1979), *rev'd in part and vacated in part on other grounds sub nom. Bryant* v. *Yellen*, 447 U.S. 352 (1980). The fact that the zone test was not mentioned by the Supreme Court in agreeing with the lower court's decision on standing is not significant because of the full consideration of the issue by the court below and because the Supreme Court only gave a cursory review of the standing decision in its ruling, focusing on Article III considerations. *Bryant* v. *Yellen*, 447 U.S. at 366-368. In *Duke Power*, the Supreme Court did not need to reach the zone of interests test because the plaintiffs were asserting rights protected by the Fifth Amendment. Marquis, *The Zone of Interests Component of the Federal Standing Rules: Alive and Well after All*? 4 U. Ark. at Little Rock L.J. 261, 291-92 (1981). Similarly, in *Eisenstadt* v. *Baird*, the issue was whether a promoter prosecuted for distributing contraceptives had standing to challenge the constitutionality of the statute under which he was convicted by asserting the Fourteenth Amendment equal protection rights of unmarried persons denied access to contraceptives. 405 U.S. at 443. Thus, *Eisenstadt* v. *Baird* was a third-party standing case. Once the Court found that Baird had standing to assert the interests of the third parties, there was no need for discussion of the zone of interests test since there was no question that the asserted right of unmarried persons to obtain contraceptives was arguably within the zone protected by the Equal Protection Clause of the Fourteenth Amendment. *See* 405 U.S. at 447.

> Even when a case falls within these constitutional boundaries, a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim.

441 U.S. at 99-100. As *Gladstone* demonstrates, the prudential limitations are not always coextensive with the Article III considerations. When a party meets the tests for Article III standing, but asserts an interest not arguably within the zone protected by the relevant statute, *Data Processing* and its progeny mandate denial of standing.

The Petitioners also argue that the general presumption of reviewability in the APA and in the case law precludes the denial of standing to a party based only on the zone of interests test. *See* Pet. at 11-12 n.10. Analysis of the decisions of this Court and of the APA demonstrates the fallacy of this argument.

The Administrative Procedure Act authorizes judicial review of agency action except where "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a) (1976). Contrary to Petitioners' argument, however, the fact that an agency decision is not completely insulated from review under one of these statutory exceptions does not entitle any party to obtain such review, regardless of whether that party meets the established tests for standing.

Significantly, the APA states that only "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action *within the meaning of a relevant statute*, is entitled to judicial review thereof." 5 U.S.C. § 702 (1976) (emphasis added). This is the APA's standing provision, identifying the parties who may obtain the review authorized by Section 701(a). *See Capital Legal Foundation* v. *Commodity Credit Corp.*, 711 F.2d 253, 260 n.17 (D.C. Cir. 1983). Whether a particular party is "aggrieved within the meaning of a relevant statute" is determined pursuant to the established standing rules articulated by this Court, including the zone of interests test. *See Data Processing*, 397 U.S. at 154; *Barlow* v. *Collins*, 397 U.S.

159, 165 (1970); *Investment Company Institute* v. *Camp*, 401 U.S. 617, 620-621 (1971). *See also Sierra Club* v. *Morton*, 405 U.S. 727, 733 (1972); *Capital Legal Foundation* v. *Commodity Credit Corp.*, 711 F.2d at 260 n.17. The APA and the decisions of this Court applying it establish that the general presumption in favor of judicial review does not eliminate the requirement that a particular party have standing to obtain such review.

Implicit in the Petitioners' argument concerning the "insulation" of BATF's decision from judicial review is the proposition that standing cannot be denied where the effect is to preclude review by any party. This contention is not in accordance with the established case law. As this Court has stated, "'[t]he assumption that if respondents have no standing to sue no one would have standing, is not a reason to find standing.'" *Valley Forge*, 454 U.S. at 489 (quoting *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974)).

C. The Zone of Interests Test Does Not Require Clarification and Should Not Be Overruled

Petitioners finally assert that this Court should either clarify or overrule the zone of interests test. Pet. at 15. SPI respectfully submits that neither action is appropriate.

Although the lower courts have no discretion as to whether the test should be applied, they have ample discretion regarding how to apply the test. As this Court has recently stated: "Like the prudential component, the constitutional component of standing doctrine incorporates concepts concededly not susceptible of precise definition. . . . These terms cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise." *Allen* v. *Wright*, 468 U.S. _____, 104 S. Ct. 3315, 3325 (1984).[7]

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[7]The District of Columbia Circuit has articulated the discretionary nature of the application of the zone of interests test:

> The 'zone test' is not a 'test' in the sense that it is capable of mechanical application to a set of facts with an easily discernible and certain result. Rather, it is, as this court has

The fact that the zone test allows discretion in its application does not mean that the standard has no limits or that it requires clarification. This Court recently rejected the idea that the discretion inherent in the standing inquiry leaves the lower courts without sufficient guidance: "The absence of precise definitions, however, as this Court's extensive body of case law on standing illustrates, hardly leaves courts at sea in applying the law of standing. Like most legal notions, the standing concepts have gained considerable definition from developing case law." *Allen* v. *Wright*, 468 U.S. at _____, 104 S. Ct. at 3325 (citation omitted).

The zone of interests test "serve[s] to limit the role of the courts in resolving public disputes" to preserve the "proper — and properly limited — role of the courts in a democratic society." *Warth* v. *Seldin*, 422 U.S. at 498, 500. This case is a salient example of the salutary effect of the test. The Petitioners are attempting to invoke limited judicial resources to force an administrative agency to conduct a proceeding in which Petitioners would have nothing of relevance to contribute to the agency's statutorily mandated inquiry. Fortunately, the zone of interests test stands as a barrier to such a wasteful exercise. A test founded on such fundamental principles should not be overruled merely because of its evolving application. *See Allen* v. *Wright*, 468 U.S. at _____, 104 S. Ct. at 3325.

> stated, one of a '*series of inquiries*' designed to determine if a particular party has standing. As an inquiry, the standard involves a great deal of discretion in its application.

Tax Analysts & Advocates v. *Blumenthal*, 566 F.2d 130, 138 n.38 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) (citations omitted; emphasis in original).

CONCLUSION

The decision of the Court of Appeals for the District of Columbia Circuit correctly applied the zone of interests test, in accordance with the decisions of this Court articulating and interpreting the test, to deny Petitioners standing to challenge BATF's action. This Court has provided adequate guidance to the lower courts for application of the test, which involves the exercise of substantial discretion in accordance with the facts of particular cases, and clarification or overruling of this important prudential consideration is not warranted. Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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